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NEW JERSEY EQUITY REPORTS.

VOLUME XXXI.

STEWART, 4.

ERRATA.

Youngs v. Trustees, p. 299 (5), for “vested” read “rested.”

Hannon v. Maxwell, p. 329 (28), for “can now” read “can not now.”

Sharswood Hall
REPORTS

—OF—

CASES DECIDED IN

THE COURT OF CHANCERY,

THE PREROGATIVE COURT,

AND, ON APPEAL, IN

The Court of Errors and Appeals,

—OF THE —

STATE OF NEW JERSEY.

JOHN H. STEWART REPORTER.

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NOTE.

This volume contains the opinions delivered in the Court of Chancery and in the Prerogative Court at May and October Terms, 1879, and those on appeal, in the Court of Errors and Appeals, at the June and November Terms, 1879.

By the Chancellor's direction, the opinions in the following cases have been omitted :

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October Term, 1879—*Carpenter v. Smith*, *Davis v. Davis*, *Janvin v. Pignolet*, and *Ridgway v. Ridgway* (Vice-Chancellor).

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CASES
ADJUDGED IN
THE COURT OF CHANCERY
OF
THE STATE OF NEW JERSEY,
MAY TERM, 1879.

THEODORE RUNYON, ESQ., CHANCELLOR.

ABRAHAM V. VAN FLEET, ESQ., VICE-CHANCELLOR.

CATHARINE E. MONTGOMERY and others

v.

WILLIAM S. SIMPSON and others.

In a suit against devisees and executors to set aside a deed to the testatrix, alleged to have been obtained by her by fraud, the complainants are not competent witnesses.

Bill for relief. On final hearing on pleadings and proofs.

***Mr. S. F. Bigelow*, for complainants.**

***Mr. J. F. Hageman*, for defendants.**

THE CHANCELLOR.

This suit is brought by Catharine E. Montgomery and her brother, William J. Montgomery, to set aside a deed

Montgomery v. Simpson.

for a house and lot in Princeton, made by them and others, as the nephew and nieces of Anthony Simmons, deceased, late of that place, to Susan Simmons, his widow. The deed was made March 24th, 1868, and purports to have been made for the consideration of five dollars and natural love and affection towards the grantee. Anthony Simmons died about the 1st of March, 1868. By his will, dated the 4th of February, 1854, he gave the use of the house and lot in question to his wife, for life, and directed that at her death the property should be sold, and the proceeds divided between all his nephews and nieces. He then, after devising the half of another house and lot in Princeton, directed the payment of certain pecuniary legacies out of the residue of his estate, and directed that the rest of the residue be invested, and that out of the interest certain payments (including a life annuity) be made, and that the principal go to his nieces, Mary Snediker, Anna Maria Montgomery, Catharine E. Montgomery, and his nephew William Montgomery—the last two the complainants. Anna Maria Montgomery died, without issue, after the testator's death. The bill states that, very soon after the death of the testator, his widow induced the complainants, by means of the representation that they were not the legitimate grand-nephew and grand-niece of the testator, because, as she alleged, their father, though the son of the sister of the testator, was not her legitimate child, and also by the promise that she would devise the property to them, induced the complainants to sign the deed. It further states that she did not regard her promise, but devised the property to two of the defendants, and that the representation as to their illegitimacy was false. The bill asks an answer without oath. All the defendants have answered.

The alleged representation and promise were, as the complainants say, made to them, and them alone. They adduce no corroboration, and they say that there was never any witness except themselves and the grantee, and she is dead. While they insist that their claim is, in fact, against the

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devisees, and not the executors of the grantees, the latter are parties to the suit.

The will of the grantee gives certain pecuniary and specific legacies, and then gives the residuum of the estate, both real and personal, to the two defendants, William S. Simpson and Mary E. Hackett, and gives the executors power to sell the real estate to pay the debts and legacies. The complainants are not competent witnesses. *Force v. Dutcher*, 3 C. E. Gr. 401; *Sweet v. Parker*, 7 C. E. Gr. 453.

It will not be out of place to remark that the evidence in the case shows that the deed in question was the result of an arrangement by which, as an act of justice to the widow, who was dissatisfied with the will, and threatened litigation, and with a view to a speedy settlement of the estate, whereby they would be enabled to obtain, without delay, the benefit of the gifts to them, the complainants joined in the deed.

The proof that the complainant Catharine was a minor, is not satisfactory. She herself, when first sworn, stated that she was born in 1846. The deed was signed in 1868. After two other persons had sworn that she was born in 1848, she was recalled, and swore that she was born in that year. It is enough to say that the bill does not allege that she was a minor when the deed was signed. The proof on this point, therefore, is immaterial.

The bill will be dismissed, with costs.

THE ESTERBROOK STEEL PEN MANUFACTURING COMPANY

v.

SIMEON J. AHERN.

1. After a final decree on a default, and an order to account had been entered on a bill to redeem certain securities, the defendant was adjudged a bankrupt, and an assignee appointed.—*Held*, that the suit

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was not thereby abated; that it was not the duty of the complainants to make such assignee a party, but that, if the assignee desired to appear in the suit, it was his duty to apply for leave to be substituted for the defendant.—*Held*, also, accordingly, that he was bound by the proceedings.

2. A petition, filed by a stranger to the suit, claiming the payment of moneys paid into court in the cause, to satisfy a judgment recovered by him against the defendant in a foreign state, dismissed on the ground that the petitioner, not being a party to the suit, had no standing and could have no relief therein, and that the proceedings for the purpose should be by bill.

Bill for account, &c. On petition of James J. Gerber, assignee in bankruptcy of the defendant, to be admitted as a defendant, and that the cause may be reheard; and on petition of the Elizabethtown Savings Institution, that the amount decreed to be due to the defendant from the complainants, and by them paid into this court, be paid over to the petitioner, on account of a judgment recovered by them against the defendant, Simeon J. Ahern, in the state of New York, in supplemental proceedings wherein it was ordered by a judge of the supreme court of that state, on the 2d of March, 1878, that the amount due from the complainant to the defendant, in the accounting in this suit, be paid to the petitioners in part payment of the amount due them on that judgment.

Mr. H. Wallis, for the complainants and for the Elizabethtown Savings Institution.

Mr. W. P. Wilson, for the assignee.

THE CHANCELLOR.

This matter comes before me on a rehearing of the petitions. The suit was brought to recover certain securities

NOTE.—In this case there were two opinions filed by the chancellor, and, through an inexcusable blunder of the reporter, the one first written was printed in *3 Stew. 341*, as the opinion of the court. To rectify that mistake as far as possible, the later one is here inserted.—**RMP.**

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belonging to the complainants, upon which the defendant had a claim for money due him from them. The bill prayed an account from him, and that, on the payment to him, by them, of the amount due, he should be required to deliver up the securities. He did not appear to the suit, although duly served with process. The bill was duly taken as confessed, and, on the 9th of January, 1877, a final decree for account and discovery was made against him on proofs taken *ex parte*. By that decree it was referred to a master to take the account. The master's report of the account is dated May 28th, 1878, and, on the 25th of June following, a decree was made that the complainants pay into court the amount found to be due from them to the defendant, on the accounting, less the amount of their taxable costs of this suit; and that, on the production of the clerk's receipt therefor, they were entitled to have and receive from the defendant all notes, checks, drafts and other evidences of debt received from them by him, as stated in the bill of complaint, and that he forthwith deliver them up accordingly. The defendant was adjudicated a bankrupt on the 16th of April, 1878, and the petitioner, James J. Gerber, was appointed his assignee, and accepted the appointment on the 20th of May following, so that the adjudication of bankruptcy and the assignment were made after the final decree and during the accounting. The assignee insists that the order made on the accounting is void, on the ground that, at the time it was made, all the right of the defendant in the subject of the controversy had devolved on him as his assignee in bankruptcy, and that, upon the making of the assignment, it was the duty of the complainants to make him a party to the suit and to stay the action until that had been done.

It is true that it is laid down, that where a party, who is a defendant to a suit in equity, becomes bankrupt, it will be necessary for the complainant, if he proceeds with the suit, to bring the assignee before the court (*Story's Eq. Pl.* § 329; *Sedgwick v. Cleveland*, 7 Paige 290; *Williams v.*

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Winans, 5 C. E. Gr. 392; 1 *Daniell's Ch. Pr.* 159); but the bankruptcy of the defendant after the commencement of the suit, while it renders the suit defective, does not cause an abatement. *Story's Eq. Pl.*; *Daniell's Ch. Pr.*, *ubi supra*. There are cases even in the English practice where it has been held that the bankruptcy of the defendant will not render the suit defective; as in *Pepper v. Henzell*, 11 *Jur. (N. S.)* 840, where a discovery was sought.

In the case before me, there was no appearance by the defendant, and there was a final decree before the adjudication in bankruptcy. Nothing remained thereafter but to ascertain what amount of money was due to the defendant from the complainants, and that proceeding, there being no appearance of the defendant, was *ex parte*. There is no reason for holding that the proceedings subsequent to the assignment are void or even irregular. It was incumbent on the assignee to apply, if he desired to intervene in the suit. He did not do so, however. He waited until after the account had been taken and the order made thereon, until the case had been completely closed, before he sought to intervene. There is no ground for admitting him. He is bound by all the equities in regard to the securities by which the defendant was bound. *Cook v. Tullis*, 18 *Wall.* 341. When the adjudication in bankruptcy was made, the complainants had been decreed to be, and they then were, entitled to the securities on paying the amount due from them to the defendant, and nothing remained but to establish the amount. In *Cleveland v. Boerum*, 24 *N. Y.* 613, it was held that an assignee in bankruptcy, under the act of 1841, who had notice of a suit for the foreclosure of a mortgage pending against the bankrupt, which he could defend in the name of the bankrupt, was bound by the decree, though he was not made a party and did not intervene in the suit; and, in *Eyster v. Gaff*, 1 *Otto* 521, it was held that where the assignee in bankruptcy of a mortgage is appointed during the pending of proceedings for the foreclosure and sale of the mortgaged premises, he stands as

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any other purchaser would stand on whom the title had fallen after the commencement of the suit, and, if there is any reason for interposing, he should have himself substituted for the bankrupt or be made a defendant; and it was also held that a court cannot take judicial notice of the proceedings in bankruptcy in another court, and that it is the duty to proceed as between the parties before it, until, by some proper pleadings in the case, it is informed of the changed relations of any of such parties to the subject matter of the suit. It is for the assignee to determine whether he will apply to be permitted to intervene, and, if he does not do so, he is bound by the result of the suit. He may be unwilling to apply, for the reason that he conceives that the litigation would be unprofitable, and, therefore, he may prefer to give no attention to the suit. The court, in *Eyster v. Gaff*, declared that it is a mistake to suppose that the bankrupt law avoids, of its own force, all judicial proceedings in state or other courts the instant one of the parties is adjudged a bankrupt, and added that there is nothing in the act which sanctions such a proposition.

In this case the final decree would have been binding on the assignee if he had applied and had been admitted. *Mif. 68*. If admitted, it would only have been to be present at the accounting. Had he desired that privilege, it was incumbent on him to make application for it. He surely comes too late, when he comes after the final order has been made and the suit is ended. The order admitting him will be vacated and his petition will be dismissed, but without costs.

The petition of the Elizabethtown Savings Institution prays that the money paid into court by the complainants be paid over to them on account of a judgment recovered by them, in New York, against the defendant. It alleges that, on supplementary proceedings on the judgment, an order was made before the defendant's bankruptcy, directing him to pay over the money to them. The petitioners are strangers to this suit. Their petition for the payment

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of the money over to them cannot be entertained. *Linn v. Wheeler*, 6 C. E. Gr. 231.

In order to reach the money in court by proceedings *in rem*, they must file a bill.

Their petition will be dismissed.

NELSON PETTY

v.

ISAAC PETTY.

1. A testator made no claim to certain property during his life-time, nor by specific devise in his will. His general devisees brought a suit to set aside deeds for the premises, executed by the testator by whom the title was held in trust. Query, whether the defendant was a competent witness, exception being taken to his testifying because the complainant was suing in a representative capacity.

2. A defendant who merely defends his title to lands when attacked, cannot be deprived of the protection of the court, although the legal title may have been put in another's name in order to keep the property away from his creditors. In the case in hand the defendant paid for the property in question with his own money, and the title was taken by his trustee directly from the seller.

Bill for relief. On final hearing on pleadings and proofs.

Mr. James Wilson, for complainant.

Mr. George C. Ludlow, for defendant.

THE CHANCELLOR.

This suit is brought to set aside two deeds for a tavern property (a house and lot) at Cranbury Station, in Middlesex county; one made by Nelson Petty and his wife to Israel H. Pierson, dated November 6th, 1868, and the other from

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Israel H. Pierson and his wife to Isaac Petty, dated September 13th, 1869; and to restrain an action of ejectment brought by Isaac Petty, in the supreme court of this state, to recover possession of that property. The complainant is the infant son of Nelson Petty (who died August 14th, 1869), brother of Isaac Petty.

The bill alleges that Nelson Petty was seized in fee of the property at the time of his death; that, on or about the 5th of November, 1868, he entered into an agreement in writing with Israel H. Pierson, to sell the property to him for \$3,500; that Pierson, being unable to comply with the agreement on his part, informed Nelson Petty of the fact, on or about the 1st of April, 1869, and, thereupon, pursuant to an arrangement between them, Pierson relinquished all right under the agreement; that, on the 6th of November, 1868, Nelson Petty and his wife, in contemplation of the carrying out of the agreement of purchase by Pierson, executed and acknowledged a deed (the one above mentioned) to Pierson for the property, but that, by reason of the arrangement by which the latter relinquished his right under the agreement, the deed was never delivered, but was kept by Nelson Petty, and was in his possession at the time of his death; that the complainant is, by the will of his father, entitled to the property in question, and that Isaac Petty, John Petty and William Hutchison were the executors of his father's will, and took upon themselves the burthen of its execution, and had possession of all the deeds, papers and muniments of title of the testator. The bill charges that among those papers was the deed to Pierson, and that Isaac Petty, or some of the executors, after the death of the testator, delivered the deed to Pierson for a merely nominal consideration, or for no consideration at all, in order to enable Pierson to convey the property to Isaac Petty; and that, by deed dated September 13th, 1869, for the alleged consideration of \$3,500 (while, in fact, but a small consideration, if any, was paid) Pierson and his wife

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conveyed the property to Isaac Petty, who now claims to be the owner thereof.

Isaac Petty, by his answer, states that, although the property was conveyed to Nelson Petty, it was purchased by him (Isaac), for himself, and was paid for with his money, and the title was taken and held by Nelson merely in trust for him; that, after the purchase, he took possession of it, and at his own expense, to the amount of \$300, put the property, land and buildings in good repair; that, on the 1st of April, 1866 (the property was conveyed to Nelson in February preceding) he moved into the house, and continued to live there and to carry on the business of a tavern-keeper in it, without payment of rent by, or any demand of rent from, him, until April 1st, 1869; that, in the fall of 1868, he sold the property to Pierson, and, though the written contract was made with Nelson, it was on his account, and only because Nelson held the title; that the \$200 which were paid by Pierson on account of the purchase-money were received by the defendant, though receipted for by Nelson; that, on the day on which the agreement was signed, Nelson said to the defendant that he would at once execute a deed in favor of Pierson for the property, so that the defendant might have the means of conveying the property to the latter, and also might thus be secured against any liability to lose the property by the death of Nelson, who was then in failing health; that the next day Nelson delivered to him the deed to Pierson, and that the delivery was unconditional, and to the end that, whether Pierson should take the property or not, the defendant might, by means of it, have security, as before mentioned; and that, when the agreement with Pierson was made, it was understood that the money which was to be paid was to be paid to the defendant, and that the mortgage which was to be made to secure part of the purchase-money, was to be made to him. The answer also states that the defendant held the deed till after Nelson's death, and then delivered it to Pierson, who, for a consideration, conveyed the property to him.

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The question to be decided is, whether the property was, in fact, when the deed for it was delivered to Nelson Petty, the property of Isaac Petty; whether the purchase was made for the latter and the purchase-money paid by him. If such was the fact, the aid of equity cannot be successfully invoked against him, whatever legal objections may be urged against the validity of the apparent legal title which he holds for the property. In such case, equity will uphold, not destroy, his title.

It appears clearly, by the evidence, that the property was bought by the defendant himself, and for himself, from William Warwick; that it was paid for by him with his own money; that the title was taken and held by Nelson merely in trust for him, and that Nelson intended, by means of the deed to Pierson, to secure the property, or the price thereof, in case Pierson took the property according to his agreement, to the defendant. William Warwick testifies that Isaac Petty made the bargain with him which resulted in the sale of the property by him, and in the consequent conveyance of it to Nelson Petty. They were unable to agree upon the price and left it to arbitrators, one chosen by each. Lewis G. Messler swears that he was the arbitrator chosen by Warwick, and that Nelson Petty was the one chosen by Isaac Petty, and that they together fixed the price to be paid by Isaac Petty to Warwick for the property. He is corroborated by Warwick. Warwick testifies that the part of the consideration money which was paid (the consideration was \$2,700, and it was all paid but \$680, which was the amount of two mortgages on it, one for \$180 and the other for \$500, the payment of which was assumed by the grantee), was paid to him by William Hutchison, a scrivener residing in Cranbury. William P. Applegate testifies that he paid Nelson Petty \$1,300 on the 2d of April, 1866, part of the consideration of a farm sold to him by the latter, and that Nelson Petty took the money up as he laid it down, counted it and handed it to William Hutchison, the scrivener, and told him that that money was to go to Warwick for the

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property bought for Isaac Petty. Warwick says the deed for the property was delivered about the 1st of April, 1866. It appears to have been recorded on the 5th of that month. On the 2d of April, 1866, Nelson Petty said to Applegate that Isaac had some money in the farm, and he was going to let him have it and put it into the Cranbury Station property; that Isaac had bought that property. Warwick testifies that Nelson told him to sell the property to Isaac, that he owed Isaac money which he could have at any time, and that Isaac had money besides what he owed him. He says Isaac paid him the money which was paid as earnest of the bargain; that Nelson at first desired that the deed should be made to Isaac, but Warwick suggested that it should be made to him (Nelson) because of Isaac's debts, but Nelson said Isaac's debts were almost all paid. After urging on the part of Warwick, Nelson agreed to take the deed. Jared J. Buckley, an intimate friend of Nelson, testifies that the latter talked to him about the property before it was bought, and said that he had money of his brother's in his hands to buy it, and he thought it would be a good place for business. He says he told him, after the property had been purchased, that Isaac had bought it. John Petty says that Nelson told him, about the time the property was bought from Warwick, that Isaac was about buying it, and the witness asked him what was his idea in buying such a property as that, why he did not buy a hotel property in Cranbury, and Nelson answered that he had about \$3,000 of Isaac's money, and he (Nelson) could not buy a hotel in Cranbury for less than \$7,000, and he did not want to invest any money in hotel property. Ralph L. Petty swears that Nelson told him that the property belonged to Isaac; that he (Nelson) had his (Isaac's) money, and bought the property with it. And, again, he says that Nelson told him that Isaac's money bought the property.

The proof is abundant that Nelson spoke of the property as Isaac's and said it belonged to the latter. But, further, it appears that Isaac sold the property to Pierson. John Petty

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testifies that Nelson told him so, and told him, also, that Isaac was to take a mortgage for almost all of the purchase-money; that Isaac was to have the mortgage. Warwick testifies that Nelson told him that Isaac had sold the property to Pierson, and at one time showed him a wagon which he said Isaac said he had got from Pierson. This witness testifies that Nelson told him that the deed to Pierson was already made out. Buckley swears that Nelson told him that Isaac had sold the property to some hotel-keeper. Pierson kept hotel. Pierson himself, called for the complainant, testifies that Isaac sold the property to him, and that he gave Isaac a wagon, a carry-all, valued at \$100, on account of the purchase-money, and afterwards paid to Nelson, for Isaac (because he was unable to find the latter at home to pay it to him), \$100 in cash, on the same account. When, subsequently, he wished to be released from the obligation of his agreement to take the property, he called on Nelson about it, and he says the latter at first would not agree to it, but said he wanted to see Isaac. He says he went again the same day; that Isaac, who was absent from home when he went the first time, had not yet returned; that he had further conversation with Nelson on the subject of releasing him from his agreement, and the latter said that he had nothing to do with it and would have to see Isaac.

The fact that the deed to Pierson was made and executed and delivered to Isaac on the next day after the agreement with Pierson was made, is a most important and significant circumstance in the proof. The deed was not to be delivered, by the terms of the agreement, until the 1st of April following. John N. Petty testifies that he was present when the deed was delivered by Nelson to Isaac. He says that Nelson got up and handed the deed to Isaac, and said, "This is the deed for the Cranbury Station property; you had better take it, in case anything should happen." He adds that Isaac took the deed and put it into his pocket and walked out, and he followed him. There is no proof of, nor

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apparently any ground for, the charge in the bill that the deed was obtained from the executors or any of them, or that it was obtained fraudulently or surreptitiously by Isaac in any way. On the contrary, the proof is that he obtained it in all respects fairly and openly. The testimony on the part of the complainant is not of such weight as to counter-vail or even weaken the effect of the very strong proof on the part of the defendant.

It will be perceived that, in my examination of the case, I have left out of consideration the answer of the defendant (under oath in response to the call of the bill) and his testimony. To the admission of his testimony objection was made when he was sworn, on the ground of his incompetency, because, as insisted, the complainant sues as devisee, and therefore is to be regarded as suing in a representative capacity. It may be remarked here, without reference to the objection just mentioned, however, that the land in question was not devised to the complainant specifically. He claims it under a general devise. There is no evidence of any intention to devise that land, or of any claim upon the land, on the part of the testator.

The complainant's counsel insists that if it be held to have been proved that the purchase-money of the property was paid to Warwick by the defendant, and that the deed was made to Nelson Petty in trust for the latter, yet equity will not recognize the trust because, as the complainant alleges, the object of the trust was to keep the property away from the defendant's creditors. It is enough to say that the defendant is not here asking relief at the hands of this court, but is defending his claim to property bought by him, with his own money and for himself, against an adverse claim.

It is also urged that it appears that Nelson paid off a mortgage of \$500 on the property, and it is argued that if the defendant's claim to the property be not rejected, the estate of Nelson will sustain loss to the amount of that mortgage. But it does not appear when the mortgage was

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paid off, nor with whose money it was paid. It is in evidence that Nelson said, in speaking of Isaac's being about to purchase the property, that he had about \$3,000 of Isaac's money. The whole amount of the consideration of the deed from Warwick was \$2,700. Again, it appears that Isaac received the \$200 paid by Pierson, and that Nelson said, after the agreement with Pierson was made, that Isaac was to have the mortgage (by the agreement it was to be for \$3,000) to be given by Pierson. And, further, it does not appear that Nelson, at any time or in any way, made or asserted any claim to, upon or against the property, or upon Isaac in reference to it.

The bill will be dismissed, but without costs.

JACOB VANATTA, attorney-general,

v.

THE NEW JERSEY MUTUAL LIFE INSURANCE COMPANY.

The charter of a mutual life insurance company provided that in case of losses exceeding the funds on hand, the policy-holders should be assessable, *pro rata*, therefor, and liable to forfeiture of their policies for non-payment of such assessments, which were also made collectible by suit, provided the assessment should not exceed the amount of the note or obligation given by them. The company was, by this court, decreed to be insolvent.—*Held*,

(1) That claims arising before the decree was entered (on ordinary policies by death and on endowment policies whereon payment had been made of all that could ever be payable) were entitled to be paid as debts, in the order in which they severally accrued, and that the other policy-holders were subject, under the charter, to assessment to satisfy such claims, notwithstanding the insolvency of the company.

(2) That the holders of similar claims arising after such decree, were not to be considered as creditors of the company, nor payable as such.

(3) That the condition of insolvency is not, in such case, of itself, destructive of the obligation to contribute.

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(4) That a policy-holder might not set off against his own bond a mortgage, representing a debt due from him to the company, the amount of premiums paid by him to the company on a policy yet due.

On petition in the nature of an information under the forty-eighth section of the act "for the regulation and incorporation of insurance companies." Application for distribution or disposition of assets, on the following petitions:

Mrs. Josephine Walworth's, for payment of a policy for \$12,000, issued by the defendants on the life of her late husband, Nathan Walworth, who died January 10th, 1877.

Amanda Neff's, for payment of a policy of \$10,000, on the life of her husband, Harmanus Neff, who died March 9th, 1877.

Eliza Munro's, for payment of a like policy for \$5,000, on the life of her late husband, Antonio Munro, who died August 9th, 1876.

Catharine Kiley's, for payment of a like policy of \$5,000 on the life of her late husband, James Kiley, who died January 2d, 1875.

Anson M. Baker's, for payment of a claim whereon judgment was recovered by him against the defendants in the United States circuit court, December 4th, 1873, for \$11,737.75. This claim was on a life policy issued upon the joint lives of Baker and his wife, payable to the survivor.

William P. Nicholas's, for claim on an endowment policy issued by the defendants in his favor for \$5,000, due March 26th, 1877.

Henry Prinz's, for leave to offset the premiums paid by the defendants on a life policy issued by them to him against money due them from him on his bond and mortgage, given to them for money lent by them to him.

Mr. E. Mercer Shreve, and Mr. Robert Sewell of New York for Josephine Walworth and Amanda Neff.

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Mr. Cortlandt Parker and Mr. R. Wayne Parker, for Eliza Munro and Catharine Kiley.

Mr. Joseph Coult, for William P. Nicholas.

Mr. A. Q. Keasbey, for holders of policies the time for payment whereof had not arrived when the decree of insolvency was made.

Mr. Ludlow McCarter and Mr. B. Gummere, for the receiver.

Mr. T. A. Jobs, and Mr. A. M. Bingham of New York, for Anson M. Baker.

Mr. P. H. Gilhooley, and Mr. John Davenport of New York, for Henry Prinz.

THE CHANCELLOR.

The New Jersey Mutual Life Insurance Company was organized under a special act of the legislature of this state, approved March 19th, 1863 (*P. L. 1863, p. 395*). By its charter it was authorized to make insurances predicated upon the lives of persons, on such terms and conditions as should from time to time be ordered and provided for by its laws, and to make contracts upon any and all conditions appertaining to or connected with life risks, of whatever kind or nature. And the charter provided that if, at any time, it should so happen that there should be just claims on the corporation for losses sustained, to a greater amount than it had funds on hand to discharge, in such cases the directors for the time being should, with all convenient expedition, proceed to assess such deficiency, in a ratable proportion, on the members of the corporation or their lawful representatives, according to the amount of each member's insurance; provided, that such assessment should not exceed the amount of the note or obligation given by such member;

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which rates of assessment should be approved of by a majority of the directors, and notice in writing was to be given to such member or his lawful representative, of the assessment and the amount which the member or his representative should be required to pay. And it was provided that each and every member or his lawful representative so notified, should pay the assessment to the treasurer for the time being, within sixty days after such notification, and, in default thereof, should forfeit all right or claim to any policy or privilege which he might have obtained, and be no longer a member of the corporation, and should be liable for the amount of such assessment, with interest, to be recovered by action of debt, with costs of suit, before any court of competent jurisdiction. All persons who should insure in or with the corporation were to be deemed and taken to be members of the corporation, and an insurance to the amount of at least \$500 was declared necessary to entitle a member to vote for directors.

On the 30th of January, 1877, a petition in the nature of an information was filed by the attorney-general, under the provisions of the forty-eighth section of the act "to provide for the regulation and incorporation of insurance companies," approved April 9th, 1875; and, on the 8th of February following, an order was made appointing a receiver temporarily, and an injunction was issued prohibiting the company from transacting business. On the 1st of May following, a decree was made declaring the company insolvent, and continuing the receiver, with the usual powers in such cases, and enjoining the company from further exercising its franchises or transacting business.

The questions which are presented by the petitions have reference either to the distribution or disposition of the assets of the company, and it will be enough to say that they are, first, whether death claims and claims on endowment policies due before the decree of insolvency, are entitled to preference over the claims of the holders of other policies, whether the contingency on which they were payable hap-

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pened after that decree or has not happened at all, or whether all claims on policies, whether for losses or return of premiums, are to stand on an equality in the distribution of the assets; and, secondly, whether the holder of a policy not due when the decree was made, has a right to offset the premiums paid thereon against the money due from him on his bond given to the company for money lent by it to him.

As to the first question, it appears to me quite clear that the answer to it must depend on the question whether those who are insured in the company are or are not, by the mere fact of the insolvency, absolved from the obligations to which they would otherwise undoubtedly be subject. It is not necessary, in view of the above quotation from the charter, to speak at any length in regard to those obligations. It is clear that, under the charter, if there were just claims for losses to a greater amount than the company had funds in hand to pay, the policy-holders, all of whom were members, would have been respectively liable to pay a ratable proportion of the deficiency, according to the amount of their respective insurances, not exceeding, however, the amount of their respective premium notes, and that the payment could have been enforced by suit. It is argued (and the argument was presented with very great ability) that the decree, if not the condition, of insolvency itself, is destructive of this obligation, and releases the policy-holders from all liability to contribute to the losses which have occurred previously thereto, as well where they have been established by judgment as where they have not. The argument is, that the purposes of the organization are frustrated by the decree of insolvency, and the mutuality which characterizes it and its objects is, *ipso facto*, rendered impossible, and, therefore, those who hold policies which, if the company had been solvent, would have entitled them to payment, and, if necessary, to contribution from their fellow-members whose policies were not due, have, in view of the insolvency, and because of it, no claim superior to the claim of the latter for return of premiums. This argu-

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ment is based on the theory that the mutual life insurance plan is but a partnership, and, therefore, when the purposes for which the partnership was created have proved impossible of attainment, the partnership itself is at an end. This view of the subject was repudiated in *Mut. Benefit Life Ins. Co. v. Hillyard*, 8 Vr. 444. If it be considered that the policy-holder whose claim becomes due is not himself liable to assessment, but is to receive the amount of his insurance from the company, and when his loss is paid he ceases to be a member, and if it be not paid he may maintain suit against the corporation for it, and so reach his fellow-members for contribution, it is obvious that the analogy of partnership will not hold. His contract with his fellow-members was not to bear any part of his own loss. He was to help to bear theirs, if theirs happened before his. His fellow-policy-holders bound themselves, in consideration of his payments and his obligation to contribute, if necessary, to pay the money which would be due on their contracts if theirs matured before his, to contribute, if necessary, to the payment of the money which would be due on his if it should mature before theirs; and when the contingency happened, when the period of payment arrived, the mutuality which, up to that time, had continued, at once ceased. The policy-holder whose policy became due thereupon, *ipso facto*, became a creditor.

If this view be correct, it follows that all policies which were due when the decree of insolvency was made, are entitled to be paid as debts of the company, and are not to be put on the same footing with the claims for return of premiums, and it makes no difference whether the claims were in judgment or not; but they should, in view of the limitation of the amount of the assessment to the amount of the premium note, be paid in the order in which they became payable by the terms of the policies. It is urged that the view which I have taken will produce results which are highly inequitable; that the claims of those whose policies, by their terms, became due after the decree of

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insolvency, are as meritorious as those which came due the day before the decree, and are, in equity, entitled to equal consideration and to like treatment. But the position is untenable. The difference between the cases is that, in the one, the claim was, when the decree was made, the claim of a creditor, and, in the other, there was no claim but that of a member, which was upon the assets, after payment of creditors.

The holder of an endowment policy who, before the decree of insolvency, had paid all the premiums which, under the contract, he could ever have been required to pay, is, though the time for payment had not arrived when the decree was made, entitled to be regarded as a creditor. His claim should be considered as *debitum in presenti, solvendum in futuro*. On the other hand, the holder of such a policy, who had not paid all the premiums which could ever have been required of him under his contract, is not entitled to be regarded as a creditor.

It is a necessary consequence of the argument in behalf of the holders of policies which were not due, that if, by reason of unusual mortality, the losses of a mutual company should at any time become so great that, upon a survey of the situation, it would appear that, after payment of the losses, there would not remain sufficient assets of the company to secure to the survivors the full payment of their policies when and if they should mature, that the losses should none of them be paid, but the company should at once go into liquidation, for the benefit of all the policyholders. That proposition, if maintained, would, obviously, put an end to the business of mutual insurance. It must not be forgotten that the amount of the assessment which the policy-holder is required to pay is only so much premium, which, under the plan, he is permitted to withhold from the company until it be seen whether it will be needed to pay losses. If paid when he took his policy, it would go into a fund, out of which the matured policies would be paid. Though he retains it until called for to pay losses, the principle is precisely the same. If paid in at the outset, he

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would have no right to complain if it should be taken to pay losses, even to the extent of depriving the company of means to pay his policy when it should mature. He has no more cause of complaint where the premium is withheld by him on a contract to pay it if needed to pay losses.

The view which I have taken is supported by two cases in Massachusetts, which are precisely in point: *Commonwealth v. Mass. Mutual Fire Ins. Co.*, 112 Mass. 116; S. C., 119 Mass. 45. The case of *The Security Life Ins. and Ann. Co.*, 11 Hun 96, is cited as an adverse decision. The court, indeed, there held that a death claim, due before the insolvency, was not entitled to preference in payment over the claims for return of premium, but the distribution was under the New York statute, and the court took pains to establish the position that the company was not a mutual one, although it provided for participation by policy-holders in the profits of its business. The court says that such participation did not, in that case, have the effect of rendering the policy-holders members of the company in any such sense as to subject them to direct or indirect liability for its losses; but its only effect was to diminish the premiums actually payable upon their policies, and to graduate the amount according to the prosperity and pecuniary success of the company.

The death claims, including all those in which the death happened before the decree of insolvency, and endowment policy claims which became due before that decree, including all on which all premiums which ever could have been required to be paid had the company continued to be solvent had been paid before the decree, will rank as debts, and the policy-holders will be assessed, if necessary, according to the provision of the charter, for the payment of any deficiency of assets to pay them. Should there be any surplus of assets after payment of the expenses of the trust and the debts, in which are included the before-mentioned death and endowment claims, it will be distributed among the other policy-holders.

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The claim of offset made by Henry Prinz remains to be considered. According to his statement, he borrowed money, on the security of his bond and mortgage, from the company. It was a condition of making the loan to him, that he should take out a life policy in the company, and he did so accordingly. He has not paid off the bond and mortgage, and it is now held by the receiver. Prinz asks that he may be permitted to offset against the amount of that claim against him, the money paid by him by way of premiums on the policy. Of course there was no agreement, between him and the company, that those premiums should be applied to the payment of the bond and mortgage. They were paid on account of his insurance. The rank of his claim as a policy-holder is as before stated. The fact that he has in his hands assets of the company, cannot entitle him to any advantage over other policy-holders in the same rank, and the fact that he is a debtor of the company, gives him no equity over them. He is not entitled to the offset which he claims, nor to any.

GEORGE W. GARDNER

v.

GILBERT RAISBECK and others.

A bill for an account and payment of the proceeds of five bonds and mortgages, alleged to have been assigned to the defendant through his importunity and fraud, for sale on commission, the proceeds of which the defendant, after sale, appropriated to his own use, dismissed on account of gross discrepancies between the allegations and proofs in this suit, and also in complainant's sworn answer in a suit in another state, touching the same matters; the assignments appearing on their face to have been made *bona fide* and for value.

Bill for relief. On bill, answer of Raisbeck, replication and proofs.

Gardner v. Raisbeck.

Mr. S. B. Ransom, for complainant.

Mr. Isaac R. Wilson, for Raisbeck.

THE CHANCELLOR.

The bill is filed for an account, and decree for payment thereon, for the amount of five bonds, with their respective accompanying mortgages securing the payment thereof, assigned, according to the bill, by the complainant to Raisbeck, in June, 1871, as his agent, for sale for a commission of ten per centum. These securities were received by the complainant for the purchase-money of property, belonging to his deceased brother John, sold under proceedings in New York for partition thereof among the heirs. One of the mortgages was given by a purchaser at the sale; the others were given by George W. Burrell, on the purchase, by him, from the complainant, after that sale, of part of the property, which was bought in by the latter at the sale for the heirs, under an agreement made by him with them. The complainant alleges, in his bill, that being desirous of obtaining the money for the five mortgages, he was induced by the defendant Charles H. Bertrand, who was his lawyer, to put them in the hands of Raisbeck, who pretended to be a real estate agent, to be sold by him for a commission of ten per cent., and that he accordingly requested Raisbeck to sell them for him; that Raisbeck, who, as well as Bertrand, did business in the city of New York, soon afterwards requested him, in view of the fact that he then lived in Connecticut, to assign the bonds and mortgages to him (Raisbeck) in order that he might have the means of immediately delivering them on sale. The bill states that at the time when the assignment was made, the bonds and mortgages were delivered "punctually" into the hands of Bertrand, to be by him delivered to Raisbeck, and that the complainant then gave Bertrand special instructions not to deliver the assignments and the bonds and mortgages until he had received from Raisbeck full and ample security to the com-

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plainant for them. It further states that, at or about the time when the complainant made the assignments, he asked Bertrand about the security he (the complainant) was to receive from Raisbeck, and Bertrand informed him that he had taken full and adequate security before delivering the assignments and bonds and mortgages, and that he would see that Raisbeck accounted for and paid over all the money to the complainant. It further alleges, that Raisbeck and the other defendants (Bertrand and Cook) conspired to cheat the complainants out of the mortgages; that Raisbeck collected one of the mortgages (known as the Mowatt mortgage, and for \$1,500) and obtained a conveyance of the equity of redemption from Burrell of the property covered by the other four mortgages, and then sold the property, and that he refuses to account for any of the money, and that the complainant has received nothing from him on account of the money due him therefor, except small sums, amounting to about \$550 in all, while the mortgages amounted to about \$25,500.

The complainant alleges, in the bill, that it was not until after he had made repeated unsuccessful efforts to obtain a satisfactory explanation from Raisbeck and Bertrand that he became suspicious that the business was not being properly conducted, and that he thereupon searched the records of Kings county, in New York, where the mortgaged premises were, and found that Raisbeck had not only purchased the equity of redemption of the Burrell property, but had subsequently sold and disposed of that property to different purchasers.

The bill asks for an answer without oath. Raisbeck alone answered. Testimony was taken on the part of the complainant, but it was only that of himself, his wife and son and solicitor. Raisbeck has put in the record of a suit in the New York supreme court, brought by Charles Gardner, brother of the complainant, against the complainant, Daniel Gardner (his brother), George W. Burrell, Catharine M. Flynn (sister of complainant) and Raisbeck and his

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wife, in or before July, 1871; and also a bill of accounting, made by the complainant, and sworn to by him, September 23d, 1871, filed, as alleged, in a suit brought by Catharine Flynn against the complainant and his brothers Daniel and Charles.

The testimony on the part of the complainant fails to support the allegations of the bill in material respects. The complainant, indeed, swears that he made the assignments to Raisbeck for the reason given in the bill (to enable him to deliver the bonds and mortgages on sale), but he testifies that he did not deliver the bonds and mortgages until afterwards, and after unsuccessful applications to him by both Raisbeck and Bertrand for them. He says Bertrand first applied some time during the same summer in which he made the assignment, and asked him for the bonds and mortgages; that he refused to let him have them; that Bertrand said he wanted to use them for a few days, and would return them; that, a day or two afterwards, Bertrand and Raisbeck came together to his house, in Chatham, in this state (to which place he had removed from Connecticut, as he says, at Bertrand's suggestion), and stayed all night; that at first they spoke to him before his wife, and said they wanted the bonds and mortgages; that he made no definite reply; that they then called him out of doors alone, and Raisbeck said: "I want those bonds and mortgages; I can't do without them"; that he did not satisfy Raisbeck, and would not let him have them; that Raisbeck said he wanted to use them, but did not say for what purpose; that he did not get them that day, and the next day they went away without them; that the same day (presumably the last-mentioned day) or the next, Bertrand came again, alone, and stayed all night, and the next morning asked him for the bonds and mortgages, saying that he wanted to use them; that the complainant replied that he would not give them to him, that he, the complainant, had no security for them, and could not let them go out of his hands; that Bertrand then threw back his coat and pointed to his breast

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pocket, and said: "I've got plenty of security; there it is—government bonds," but did not show any bonds, and that the complainant then said: "If that's the case, if you have got security for them, I'll let you have them," and he then gave them to him, Bertrand promising that he would "see that everything was right." This statement differs very materially from the allegation of the bill in regard to the delivery of the bonds and mortgages to Bertrand. His son's version of the matter is different from his. He says that shortly after his father removed from Connecticut to Chatham, Bertrand visited his father, and he thinks he came after the bonds and mortgages; that Bertrand did not get them at that time, and came again, shortly afterwards, accompanied by Raisbeck; that they stayed all night; that they said they had come after the bonds and mortgages; that he does not remember what reply his father made; that his mother went up stairs and got the papers and gave them to his father, who gave them to Bertrand and Raisbeck; that he does not know of their paying anything for them; that he saw nothing paid, and that he heard nothing said about what was to be done with the papers.

The complainant's wife says that Raisbeck said he wanted the bonds and mortgages in order to get the description of the property from them, and would return them again. But the complainant's answer in the suit brought against him and Raisbeck and Burrell, by his brother Charles, is conclusive against him. That suit was a suit in equity brought against them for relief based on the ground of conspiracy on their part to cheat the complainant's brothers and sister, parties to that action, by means of the assignments of the bonds and mortgages in question in this suit. The plaintiff in that suit expressly alleged that those assignments were made without consideration, and in furtherance of an agreement, between Raisbeck and the complainant in this suit, to cheat the plaintiff in that action, and others, the heirs of the complainant's brother John. To that action, Raisbeck and the com-

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plainant in this suit appeared, and not only did the former answer that he bought and received the assignments of the bonds and mortgages and the deed from Burrell, for the equity of redemption, in perfect good faith, for a fair and valuable consideration, and wholly without any notice or knowledge of anything affecting either, but the complainant in this suit answers, on oath, that the assignments were made by him to Raisbeck for valid and full consideration to him paid.

That action resulted in a finding, by the court, that the complainant in this suit assigned the four mortgages (the Burrell mortgages) in question in that suit, to Raisbeck for a good and valuable consideration and without any fraud, collusion or conspiracy with Raisbeck or any person whomsoever, and without any knowledge or information, on the part of Raisbeck, of the existence of the trust on which the complainant in this suit held them (but that he had knowledge that Daniel Gardner and Catharine Flynn had some interest in the proceeds); and that the conveyance, by Burrell, of the equity of redemption, was for a good and valuable consideration and without fraud, collusion or conspiracy, and without any knowledge or information, on the part of Raisbeck, of the existence of any trust affecting Burrell's title to the property; and that Raisbeck had an absolute title in his own right in fee to the property, free from all claim. Raisbeck's claim to the absolute ownership of the Burrell bonds and mortgages was litigated in that suit, and it was established not only with the knowledge but with the aid of the complainant in this suit. It is true, he now says that he did not understand that the answer contained an admission that Raisbeck had paid him for the bonds and mortgages, but obviously he cannot, by this mere statement, avoid the effect of the answer, and he must be held to have understood the very plain admission which the answer makes. And, again, he does not deny that he understood the object of that suit, nor that it was necessary to the defence to establish Raisbeck's title as a *bona fide* owner of

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the bonds and mortgages, for valuable consideration, without notice of the trust, which it was the object of that action to establish in favor of the very persons who, as the complainant in this suit states, then were beneficially interested therein, and whose rights in the premises it was the object of the plaintiff in that action to establish.

The question, therefore, whether Raisbeck was such *bona fide* holder to his own use absolutely, or whether he was merely a trustee, was the great question in the cause, and the complainant in this suit answered that Raisbeck was such *bona fide* owner, and aided in defeating the action brought in the interest of those who, as he says now, were then entitled to a judgment that Raisbeck was but a mere trustee.

From the extraordinary history of arrests and prosecutions contained in the testimony of the complainant, it appears that the complainant (as he says, on Bertrand's advice) began a suit against Raisbeck in New York, by arrest, for the recovery of the amount of the bonds and mortgages, less ten per cent. for commissions, and in it Raisbeck was held to bail in the sum of \$25,000. The suit was no further prosecuted, however, but was discontinued. The complainant says that the discontinuance was without his consent, and he adds that Bertrand told him that it was due to the treachery of the complainant's attorney, whom Raisbeck had won over to his interest, as Bertrand alleged, by the bribe of a suit of clothes.

That suit was begun between October and December, 1872. It does not appear that the complainant took any further steps in or in regard to it; but it does appear that, in December, 1872, Raisbeck brought an action on the case against Bertrand and Edwin M. Cook, one of the defendants in this suit, in the Hudson circuit court. In that suit Bertrand and Cook were arrested and put in jail. On the 18th of the last-mentioned month, the complainant began a suit, employing an attorney designated by Bertrand, in the court last mentioned, against Raisbeck, to recover the

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money for the bonds and mortgages, and obtained an order for bail in the sum of \$25,000 on the *capias* issued whereon Raisbeck was arrested, and the suit was almost immediately ended by an arrangement by which the complainant accepted Cook and Bertrand as bail to the sheriff, and agreed to take an assignment of the bail-bond if special bail should not be put in, and not to rule the sheriff to bring in the body or otherwise hold him responsible in the premises. And thereupon Cook and Bertrand were released. The complainant says he knew Cook and Bertrand were entirely irresponsible, but says the agreement just mentioned was made without his consent or knowledge. It is signed by his attorney in the suit, however. He says that he does not know what became of the suit.

In January, 1873, Raisbeck brought an action against the complainant for damages for false imprisonment in the last mentioned suit, and obtained an order for \$5,000 bail, and in October, 1873, Cook preferred a charge of perjury against the complainant. After the complainant was discharged from his imprisonment on this charge, Cook sued him for damages for false imprisonment, and caused his arrest in that suit. The complainant was committed to jail, and then Raisbeck and Cook made a charge of subornation of perjury against him, on which he was committed to jail in Newark. No indictment was found against him but Raisbeck and Bertrand were indicted for conspiracy in that matter. They were convicted and sentenced to imprisonment in the state prison, to which they went accordingly. While they were in prison the complainant began this suit.

The assignments all appear, on their face, to have been made for full value, paid by Raisbeck to the complainant.

The complainant is not entitled to the relief which he seeks. The bill will be dismissed, with costs.

Price v. Weehawken Ferry Co.

RODMAN M. PRICE and others, executors,

v.

THE WEEHAWKEN FERRY COMPANY and others.

1. The power of eminent domain confers the right to take property on making just compensation, and that compensation in such case is, so far as the value of the land is concerned, to be estimated as of the time when possession was taken, and therefore cannot include the value of improvements subsequently put upon the property by the party entering under the right. But where, as in this case, the entry was not under that right, the right to take the property on compensation does not exist, and the party entering and improving does both, subject to the right of the mortgagee whose mortgage was on the property, to sell, for the payment of his debt, the land and the permanent improvements incorporated with it. In the one case the maxim "*Quicquid plantatur solo, solo cedit*" is not applicable; in the other it is.

2. The Erie Railway Company constructed a track over a part of certain premises which were covered by a prior mortgage duly recorded. The track was built, not under ordinary condemnation proceedings in eminent domain (on the contrary there was an express inhibition in their charter against occupying those lands), but under a grant of right of way from the mortgagors.—*Held*, that the company had no right to have the track &c., put on the premises by them, reserved from a sale under foreclosure of the mortgage.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. R. Gilchrist, for complainants.

Mr. Cortlandt Parker and *Mr. R. Wayne Parker*, for the receiver of the Erie Railway Company.

THE CHANCELLOR.

The sole question presented for adjudication on the hearing was, whether, as to the part of the mortgaged premises on which the railroad of the New York and Fort Lee Railroad Company is built, the receiver of the Erie Railway

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Company (who holds a lien thereon as against the New York and Fort Lee Company, for cost of construction of the road by the Erie Company, under a contract for that purpose between the two companies) has, as against the complainants' mortgage, an equity to have the superstructure of the road reserved from the foreclosure sale. The railroad was built over the mortgaged premises, not under the provisions of the charter of the railroad company, but under a grant of right of way from the mortgagors, made after the complainants' mortgage (which is dated June 22d, 1859, and was recorded on the 28th of the same month) had been given and recorded. The charter of the railroad company not only gave them no authority to locate their road there, but prohibited them from doing so. It confined them at that place to the land occupied by the Hoboken and Hudson River Turnpike Company, by providing that the railroad should not be laid or constructed upon any land other than such as the turnpike company should occupy or be entitled to occupy for their turnpike road by virtue of their act of incorporation (March 12th, 1857) and its supplements (*P. L. 1861, p. 399, § 20*). At the passage of the railroad charter, the turnpike had been located. A supplement to the charter of the turnpike company, passed in 1858 (*P. L. 1858, p. 471*), authorized that company to locate and construct branches to their road, but expressly prohibited them from laying the branches on what are now the mortgaged premises. No branches were ever located under this power.

By an act passed in 1864 (*P. L. 1864, p. 450*), the railroad company was empowered to alter and relocate the turnpike road as they might deem reasonable, expedient and right, but with this limitation, that the location should not be established more than ten feet eastwardly or westwardly from any one point of the then location of the turnpike road without the consent, in writing, of the owners of the land over which the new location might be proposed to be made, and that the combined width of the railroad and turnpike

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should not exceed sixty feet, except where the turnpike, as then located, should exceed that width from Bull's Ferry to King's Point. Within those limits the mortgaged premises are, and the turnpike is fifty feet wide there. The railroad over the mortgaged premises is at least one hundred feet distant eastwardly from the turnpike. The limitation of the location was undoubtedly due to the fact that, between the foot of the precipitous rocks (the Palisades) at that place and the river there is but little ground, and economy of space for location of roads was therefore very desirable.

It is manifest that the railroad company, under their charter, have no right to the present location of their road through the mortgaged premises. It is urged, it should be remarked, that the act of 1861 gave them the right to occupy with their road any land which the turnpike company were "entitled to occupy." But the latter company had, previously to that time, located their turnpike on what is now the mortgaged premises, and the act of 1864 prohibited them from laying branches over those premises. They had, then, in 1861, no right to occupy any more or any other part of the mortgaged premises than that on which the turnpike road was located. The railroad company have never had any right to condemn the land on which their road is laid over the mortgaged premises.

It is insisted, however, that an act which was passed in 1871 (*P. L. 1871, p. 945*), by which the contract for building the railroad for which the before-mentioned lien was created, was validated and confirmed, and the money due under it declared to be a first lien on the road "as constructed," is a legislative recognition of the power of the railroad company to locate their road there, notwithstanding the prohibition and limitation before mentioned. But that act, manifestly, was intended to do no more than to authenticate the agreement and recognize the power of the contracting parties, the New York and Fort Lee Railroad Company and the Erie Railway Company, to make it and

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to establish the lien on the work done. It contains no indication of intention, on the part of the legislature, to validate the location. Such was not the object of the act. When, in the third section, it gives power to the New York and Fort Lee Railroad Company to mortgage their property, its language is merely general. It gives power to borrow money and to secure the loan, by mortgage the company's property, real and personal, and railroad franchises.

There is no evidence of location by mistake. No mistake is set up in the answer or alleged. It is evident that the company understood that they were not exercising the charter power of location in locating the road over the mortgaged premises, for in the agreement under which the road was built they reserve the right to change the location.

Nor is the right to the equity claimed established by the mere fact that the mortgagee knew that the road was being constructed over the mortgaged premises. There is no present amount power of condemnation here as there was in the case of *North Hudson County R. R. Co. v. Booraem*, *Stew. 450*, no power (the right of eminent domain) to take the property, superior to the rights of both mortgagor and mortgagee. The power of eminent domain confers the right to take the property on making just compensation and that compensation, in such case, is, so far as the value of the land is concerned, to be estimated as of the time when possession was taken, and, therefore, cannot include the value of improvements subsequently put upon the property by the party entering under the right. But where, in this case, the entry was not under that right, the right to take the property on compensation does not exist, and the party entering and improving does both subject to the right of the mortgagee whose mortgage was on the property, to sell, for the payment of his debt, the land and the permanent improvements incorporated with it. In the case, the maxim "*Quicquid plantatur solo, solo cedit*" is applicable; in the other, it is.

Johnson v. Buttler.

The receiver of the Erie Company is not entitled to have a provision inserted in the final decree that the permanent improvements be reserved from the sale.

SAMUEL JOHNSON

v.

GEORGE BUTTLER.

A cross-bill is not necessary in a suit between partners, wherein the complainant seeks a dissolution and an account from the defendant, to enable the latter to get an account from the former, or to obtain relief against fraudulent practices of the complainant in giving the note of the firm without consideration, for his own benefit, and in buying up the paper of the concern at a discount, for his advantage, with a view to obtaining the full amount thereof out of the assets of the firm. Such a bill will not be sustained on demurrer.

Bill for relief. On general demurrer to cross-bill.

Mr. E. W. Strong, for demurrant.

Mr. A. V. Schenck, contra.

THE CHANCELLOR.

The original bill was filed for a dissolution of the copartnership between the parties to this suit. It prays a dissolution and liquidation, and the ascertainment and settlement of the respective accounts and interests of the parties. The cross-bill alleges that the complainant made false and fraudulent entries in the firm's books to his own advantage, and omitted to charge himself with moneys of the firm received by him, and which he applied to his own use. It states, also, that, before the filing of the original bill, he gave to his son-in-law a note made by him in the name of the firm, for

Johnson v. Buttler.

\$4,500 and interest, without the defendant's knowledge or consent, and without consideration, and merely for his own personal advantage and to defraud the defendant; and that he has, since the appointment of the receiver in the cause purchased claims due from the firm for fifty cents on the dollar of their nominal value, with a view to obtaining the full amount thereof for his individual profit, out of the assets of the firm.

Though the cross-bill in form prays a discovery, it asks an answer without oath. It is manifest that it is not necessary to the defendant's defence. Without it he will be able to avail himself in this suit of all the matters set up in it. He will be entitled to an account under the original bill (*Scott v. Lalor's ex'rs*, 3 C. E. Gr. 301; *Story's Eq. Jur.* § 522) also to protection against the note of \$4,500, if it was, as he alleges, given fraudulently; and to protection, also, against the complainant's alleged effort to gain advantage over him by purchasing the debts of the concern. In reference to those claims and the note of \$4,500, payment may be stayed by petition until the matter shall have been investigated and the rights of the parties established. Under our practice a cross-bill would be entirely unnecessary in this case to obtain the benefit of a discovery (*Rev. p. 111, Chancery* § 44), but no discovery is in fact sought by this bill, for, as before stated, it asks that the answer be without oath.

The complainant should not be put to the trouble and expense of answering. The cross-bill being unnecessary, it should be dismissed. The demurrer, therefore, is sustained

Green v. Blackwell.

CALEB S. GREEN

v.

EMILY A. BLACKWELL and others.

1. A trustee is at liberty to apply to this court for his release from the trust, on the sole ground of unwillingness to act further therein.

2. The fact that he is one of two trustees, and that the deed of trust provides that, in case of the death of one, the survivor shall nominate, and, with the consent and approbation of the parties to the settlement or the survivors or survivor of them, appoint a new trustee in the place of the one who has died, will not induce the court to refuse the release. The court will supply the place of the trustee released.

3. That a very large and unexpected addition to the trust estate has been made, is, in itself, a good reason for releasing an unwilling trustee.

Bill for relief. On bill and answer, on final hearing.

Mr. B. Gummere, for complainant.

Mr. J. Wilson, for Mrs. Blackwell.

Mr. F. Kingman, for infant defendant.

THE CHANCELLOR.

The complainant is one of the two trustees under the marriage settlement of Mrs. Blackwell. He applies, by his bill, to be discharged from that trust on his accounting (due allowance to be made to him for his disbursements and commissions) and paying and delivering over the money and securities of the trust estate which shall be found to be in his hands. The *corpus* of the trust estate under the marriage settlement (which was made in 1863) was \$20,000. That estate the complainant took into his hands and has managed up to this time. By the will of the settlor, Henry W. Green, who died in 1876, a very large addition was made to the trust estate. The complainant, under the

Green v. Blackwell.

circumstances and in view of that addition, declines to act further as trustee thereof. He has not assumed, but has renounced, the trusts under the will. The defendant opposes his discharge, insisting that he shows no sufficient reason therefor. But he is undoubtedly at liberty to apply to this court for his release on the sole ground of unwillingness to act further in the trust. *Perry on Trusts* § 274; *Levin on Trusts* 582; *Matter of Jones*, 4 Sandf. Ch. 614. And the greatly increased amount of the estate devolved upon the trustee by the will, and which it will be incumbent on him to manage if he continues in the office, is a sufficient ground for relieving him if he desires it. *Greenwood v Wakeford*, 1 Bear. 576; *Corentry v. Corentry*, 1 Keen 758. He undertook, by the marriage settlement, to manage an estate of \$20,000. It is not unreasonable in him to decline to continue the management of it, in view of the addition under the will, which was not contemplated in the settlement, by which it is to become ten times greater. Besides, the trust is not in the hands of the complainant alone. His co-trustee remains.

The marriage settlement, indeed, provides that in case of the death of one of the trustees thereunder, before the trust shall be fully executed or otherwise determined, the surviving trustee shall nominate, and, with the consent and approbation of the other parties to the settlement or the survivor or survivor of them, appoint a new trustee in the stead of the one dying, and it is urged that this provision for the exercise of personal judgment and discretion in the succession in the trust, should induce this court to refuse to relieve the complainant. But no difficulty will be experienced on that score, for this court will supply the place of the complainant. *Hill on Trustees* 199. The complainant will be permitted to account, and, in the account, will be allowed all proper disbursements made by him for the estate, and also proper commissions: and he will be required to pay or deliver over the trust estate which will, on the accounting, be found remaining in his hands, and thereupon he will be

Bradshaw v. Clark.

discharged. Under the circumstances, he will be entitled to costs. *Greenwood v. Wakeford, Coventry v. Coventry, ubi supra; Perry on Trusts § 901.*

REBECCA BRADSHAW

v.

CHARLES CLARK.

In his answer to a bill for an account, the defendant admitted the receipt of the money in respect of which the account was prayed, but alleged that he had, according to an agreement between him and the complainant, appropriated it to the payment of a debt due from her to him. The complainant set the cause down for hearing on bill and answer.—*Held*, that the appropriate decree was that the defendant account.

Bill for an account. On final hearing on bill, answer and replication.

Mr. D. J. Pancoast, for complainant.

Mr. P. L. Voorhees, for defendant.

THE CHANCELLOR.

The bill is filed by a tenant in common of land, against her co-tenant, for an account of rents &c. received by him from the property, and payment by him to her of her share thereof. The defendant, by his answer, admits the receipt of the rents, and gives an account of them, but alleges that the complainant's share thereof was received and appropriated by him, under and according to an agreement between him and her by which it was to be applied to the payment of the interest of the price of a farm bought by him, at her request (she is his sister), to provide for her and her children a place to live upon, and also for the taxes on the farm; which

White v. Dwyer.

interest and taxes, he says, she agreed to pay as rent for the property.

The complainant insists that she is entitled to a decree for her share of the amount of the rents as admitted by the answer, on the ground that there is no proof to sustain those allegations of the answer which are not responsive to the bill. But the appropriate decree in the case as it stands is, that the account be taken. *Campbell v. Campbell's adm'r*, 4 Hal. Ch. 738, 743; *Hudson v. Trenton Loco. &c. Mfg. Co.*, 1 C. E. Gr. 475, 476.

I am not satisfied that there is nothing due to the complainant. The defendant admits that he has received the rents for which he is called to account, but at the same time alleges that they were received by him under an agreement by which he was to appropriate them to the payment of the complainant's debt to him. There is no proof to sustain the irresponsive allegations before referred to. The defendant should be required to produce his proof. There will be a decree for an account.

ROLLIN G. WHITE, guardian,

v.

PATRICK J. DWYER and others.

An attorney, with the consent and instructions of a mortgagor, deducted money from the amount of the mortgage, as compensation for examining the title, drawing the papers and obtaining the loan, no part thereof being received by the mortgagee.—*Held*, not to constitute usury.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. P. H. Gilhooly, for complainant.

Mr. W. R. Wilson, for Dwyer and wife.

White v. Dwyer.

THE CHANCELLOR.

The answer sets up the defence of usury. It states that the agreement for the loan was made by Dwyer, the mortgagor, with Smith W. Whitehead, the mortgagee, and that the latter took, pursuant to an agreement between them, a premium of ten per cent. over and above the lawful interest. The proof is that Whitehead did not make the loan, but that it was made by the complainant, through his attorney, with whom Dwyer negotiated for it, and the mortgage was made to Whitehead merely at the suggestion of the attorney, and without the knowledge of the complainant. The attorney testifies that Dwyer knew that the money lent was the money of the complainant, although the mortgage was made to Whitehead, and Dwyer says that he had nothing to do with Whitehead in the matter, and that the attorney told him that the money did not belong to him (the attorney). He says, too, that the attorney told him either that he could give him the money or get it for him (he cannot say which was the expression), and he also says that when he agreed to give the attorney ten per cent., he told the latter that he intended that it should cover all the expenses, the drawing of the papers, &c. It is evident that the attorney received from Dwyer, with the full consent of the latter, a sum equal to about ten per cent. of the loan, as compensation for drawing the papers and examining the title to the property, as well as for obtaining the loan. The complainant neither received the percentage so paid, nor any part of it, nor did he know that it had been paid.

There is some proof in regard to certain shares of horse-railroad stock, which were purchased or obtained by Dwyer from the attorney at the time of the loan, and in connection therewith. The answer is silent on that subject. The stock did not belong to the complainant nor to the attorney, but to some other client of the latter. The complainant knew nothing of that transaction. It does not appear, whatever the transaction was, that the stock was taken at a higher

 Ackerson v. Lodi Branch R. R. Co.

 Libby v. Rennie

price than its market value. Nor does it appear to have been a cover for usury in any way.

There will be a decree for the complainant for principal interest and costs.

GARRET G. ACKERSON, trustee, &c.,

v.

THE LODI BRANCH RAILROAD COMPANY and others

HARRISON J. LIBBY and others

v.

WILLIAM RENNIE and others.

1. In a suit by an assignee to foreclose a mortgage held by a mortgagee as collateral security for non-payment of interest on the bonds, the mortgagee or his assignee cannot set up that the mortgage does not mature until the principal shall become due on the non-payment of interest. *Held*, the mortgagor, who was a party, not having interposed any defence.

2. By an agreement, a judgment creditor was to accept installments, in payment of his judgment of \$60,000, the debtor to withdraw a pending appeal on such judgment, and to pay the installments promptly, or, in default thereof, the judgment creditor to collect the full amount of the judgment (\$60,000) remaining unpaid. *Held*, that failure to pay according to the agreement could be regarded as a forfeiture or penalty which it was inequitable for the court to enforce.

3. Where a mortgagee in possession assigns the mortgage to another mortgagee, who has no actual notice of the assignment, the mortgagor, against the assignee, to an account of the rents and profits from the time of recording the assignment (but not afterwards) if the same were then applied on the mortgage debt.

4. A party defendant in a foreclosure suit cannot be held liable for a deficiency prayed against him in the bill, unless a writ of habeas corpus be served on him with the subpoena to answer with *Rule 53*.

Ackerson v. Lodi Branch R. R. Co.Libby v. Rennie.

On final hearing on pleadings and proofs.

Mr. George H. Coffey, and *Mr. Philo Chase* of New York,
or complainants.

Mr. W. M. Johnson, for defendants.

THE CHANCELLOR.

These causes were heard together by consent of counsel. They are a suit for foreclosure of a mortgage given by the Lodi Branch Railroad Company, on its railroad and equipments and franchises, to Garret G. Ackerson and Cornelius L. Blauvelt, trustees (the latter is dead), to secure the payment of bonds dated July 1st, 1873, and payable July 1st, 1893, to the amount of \$50,000 of principal, bearing interest payable half-yearly, all of which are held by the Messrs. Libby by assignment from Robert Rennie to them; a suit for foreclosure of a mortgage given to Robert Rennie by William Rennie, on land in Lodi township, in Bergen county, to secure the payment of his bond for \$10,000, with interest, which bond and mortgage were assigned to the Messrs. Libby by Robert Rennie; and a cross-suit, in favor of William Rennie, against the Messrs. Libby, to establish and make available to him certain equities which he claims against Robert Rennie, his mortgagee, and therefore against them as assignees.

The bonds secured by both mortgages were assigned to the Messrs. Libby by Robert Rennie, under an agreement between them and him, by which they agreed to accept \$30,000, if paid according to the terms of the agreement, in satisfaction of a judgment for \$54,500 in their favor against him, in the superior court of the city of New York, and on which suit had, when the agreement was made, been begun in the supreme court of this state, and for the entry of judgment wherein, immediately, the agreement provided. The railroad bonds and the William Rennie bond and mortgage were, with other securities, assigned to

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Messrs. Libby, as collateral security for the payments which Robert Rennie, by the agreement, agreed to make. Those payments ran through a considerable period of time \$2,000 were to be paid at the date of the agreement August 25th, 1873, with interest from the 1st of the month; \$1,000 in thirty days from August 15th, 1873, with interest; \$1,000 in sixty days from that date, with interest; \$1,000 in ninety days from August 25th, in that year, with interest; \$1,000 on the 15th of November, in the same year, with interest on the unpaid balance of the \$30,000, to that date, from August 1st, 1873; and \$1,000 on the 15th of each month thereafter, with the interest then accrued on the unpaid balance of the \$30,000. Of the \$30,000, only \$11,702.57, without interest, were paid, and there is now due on the judgment a balance of about \$60,000.

The default in the payment of the interest on the railroad bonds is fully proved. No interest has ever been paid on them. The complainants in the suit on the railroad mortgage are entitled to a decree of foreclosure and sale.

Robert Rennie insists that the default in the payment of interest on the railroad bonds does not entitle the complainants to maintain a suit for foreclosure, inasmuch as the mortgage does not provide that the principal shall become due on default in payment of interest. It is enough to say that, if the position were tenable, it would not be a defence available to him. The mortgagors set up no defence in the suit. He further insists that the complainants are not entitled to a decree of foreclosure and sale until the amount due from him to them, which he insists is only the balance of the \$30,000 and interest, shall have been ascertained. It is quite clear, from the explicit language and provisions of the agreement, that, by reason of his non-compliance with the terms as to payment, he lost the advantage which otherwise would have been secured to him. Nor can the stipulation that, if he should fail to pay the \$30,000 and interest as therein provided, he should lose the benefit of the agreement, on the part of the Libbies, to receive the lesser sum of \$30,000 and

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interest for the judgment and interest, be regarded as a forfeiture or in the nature of a penalty. By the agreement, he, in consideration of the stipulation just referred to, agreed to withdraw his appeal from the New York judgment, and to permit the entry of judgment forthwith in the pending suit in this state on that judgment. It does not appear, it may be remarked, that he had any substantial ground of appeal. But, however that may have been, he abandoned the appeal in consideration of the agreement, on the part of the plaintiffs in the judgment, to accept \$30,000 and interest therefor, if paid according to the stipulations of the agreement. The agreement contained the stipulation, that, if he should fail to make any one of the payments making up the \$30,000 and interest, for five days after the time fixed for such payment, he should be entitled to no deduction from the judgment, but should pay the entire amount thereof to the plaintiffs, and that they should, in that case, have the right to apply any payment or payments made by him on account of the \$30,000, towards the payment of the judgment, and to hold and dispose of the securities for the payment of any balance due on the judgment. He has, under the circumstances, no equity against the complainants in the railroad foreclosure suit, arising from the agreement.

William Rennie, in his answer to the bill in the suit on his mortgage and in the cross-bill, alleges that Robert Rennie, the mortgagee, was, from the time of the execution of the mortgage, in possession of the mortgaged premises and received the rents and profits thereof. He also claims an equity to have the mortgaged railroad property and franchises sold before the premises mortgaged by him, in order that he may avail himself of his equity to have the rents and profits of the premises mortgaged by him applied in full to his mortgage as against Robert Rennie, if, as he apprehends, he cannot have the full advantage of such equity as against the Libbies. He denies any knowledge of the assignment of that mortgage to the Libbies, and it does not appear that he had any actual notice until the beginning of

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the suit for foreclosure thereon. He had constructive notice from the time (October 10th, 1873) when the assignment was recorded. (*Rev. p. 708*). The assignees took the assignment, subject to the equities existing in his favor at the time of the assignment against the mortgagee. As against the latter, he was entitled to an account of the rents and profits and to have an application thereof to the mortgage debt and interest. He is entitled to it, as against the Libbies, as to the rents and profits up to (but not since) the time of recording the assignment.

Though the bill in the suit against William Rennie prayed a decree for deficiency against him, there was no ticket or notice stating that such relief was sought against him, nor was served on him with the subpoena to answer. Indeed, no return is returned with the writ. There cannot, therefore, be a decree for deficiency against him. *Rule 38.*

It appears that the mortgaged premises in the railroad mortgage will probably not bring enough to pay the amount due the complainants in that suit. It is, as before stated, about \$60,000. It is in evidence that their fair value is about \$15,000, and that the fair value of the William Rennie property is about \$6,000. There is no reason to suppose that William Rennie's claim for rents and profits, as against Robert Rennie, can be protected by selling the railroad property first. Should there appear to be any reason for doing, it may be ordered without delaying the proceedings on execution.

There will be a decree in each of the foreclosure suits, in accordance with the conclusions above expressed.

Bell v. Bradner.

MIDDLETON BELL and wife

v.

WILLIAM B. BRADNER.

On a bill for specific performance of an agreement to convey, for a specified price, an interest in a land association, including the one-half of a certain lot,—*Held*, that the vendee could not be required to pay assessments previously made on such interest; but the cost of subsequent improvements made on the lot, with the vendee's consent, were allowed.

Bill for relief. On final hearing on pleadings and proofs.

Mr. I. W. Scudder, for complainant.

Mr. F. E. Bradner, for defendant.

THE CHANCELLOR.

On or about the 1st of October, 1873, Mrs. Eleanor M. Bell, one of the complainants, purchased from the defendant, at the price of \$1,200, then paid, one-half of the latter's interest, which was one-sixtieth, in the corporate association of this state, called The Ocean Beach Association. Upon his share, the half of which he so sold to Mrs. Bell, the defendant had paid an assessment of \$500. This he paid on or about the 9th of December, 1872. At the time of the sale the defendant was building a cottage upon the land which had then been assigned to him by the association out of its lands, on account of his share. Subsequently the cottage was completed, and, after it was finished, certain improvements on the premises on which it stood, consisting of the building of a barn, fences &c., were made by Mrs. Bell. The bill is filed to compel a conveyance to her of her interest in the share, including the land assigned to the defendant on account of the share, and an account in respect to

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the moneys paid by her on account of the cottage and other improvements before mentioned.

By the answer the defendant sets up the statute of fraud as a bar to the claim for a conveyance, and he insists that by the terms of the bargain between him and Mrs. Bell for the sale of the half of his interest, she was to pay half of all the money which he had paid on account of the share, as well as one-half of all that he should be afterwards required to pay. He also insists that he is not liable to pay any part of the cost of the above-mentioned improvements.

The defence, based on the statute of frauds and perjuries cannot be maintained. In the first place, when the sale was made, the defendant gave to Mrs. Bell a receipt, signed by himself, for the purchase-money (\$1,200), by which he acknowledged that he had received that sum from her, "for one-half interest in the association at Ocean Beach, N. J." He admits that he sold to her half of all his interest in the association. In the next place, on the 3d of November 1873, he gave her a certificate, in writing, signed by himself, that he held, in his name, the deeds given to him by the association for the property, the lots of land assigned by it to him on account of his share (describing the deed and property), in trust for her and himself, and that he and she owned the property in equal shares. Again, Mrs. Bell has not only paid the purchase-money, but she has gone into and holds possession of the property so assigned. Mr. Bell, her husband, appears to have made the bargain for the purchase. He swears that there was no understanding that she was to pay anything on account of any assessments or assessments which had been previously paid on account of the share, although the fact that the defendant had paid \$500 on account of it before the sale, was mentioned by the latter. The defendant, on the other hand, swears that she was to pay half of everything paid or to be paid to the association by him. The receipt is silent as to past assessments or payments. It acknowledges the receipt of \$1,200 in satisfaction of the half of the defendant's interest in the

Bell v. Bradner.

association. The certificate of December 3d, 1875, is also silent on the subject. He does not appear to have demanded from her payment of the half of the assessment in question before this suit was brought. On the other hand, he appears not only not to have refused to give her a conveyance of her interest, but to have expressed his entire willingness to convey it to her without imposing terms of any kind, or claiming that anything was due to him from her. The same considerations apply to the contribution made by the defendant towards the building of the boarding-house on the property, of which he claims that she should pay to him one-half. The boarding-house was built before she purchased, and the defendant says that nothing was said about it when she bought her interest from him. The weight of the evidence is against his claim to contribution in respect to those payments.

As to the improvements, Mr. Bell swears that the understanding between his wife and the defendant was, that each should pay one-half of their cost. He says he asked the defendant to furnish one-half of the money to make them, and the latter said that he had no ready money to do it, but that if Mr. Bell would make the improvements, the latter could then let the house and receive the rents until the cost of them should have been thus paid. He testifies positively that the defendant was to pay for one-half of the improvements. The defendant, in his testimony, admits that he consented to part of the improvements, the building of the stable, kitchen and fences, but says that he qualified the consent by saying that he said he would be willing to spend a year's rent in making them. He does not say that there was any agreement that the cost should be limited to the amount of one year's rent. It is admitted that the improvements were not only made with his knowledge, but with his consent; and, further, they appear to have been necessary additions to the property.

There will be a decree that the defendant convey the interest (one one-hundred-and-twentieth part) in the associa-

Mutual Benefit Life Ins. Co. v. Jackson.

tion sold by him to Mrs. Bell, and that he convey to her one-half of the land assigned to him on account of his share; also, that he account with her, and that, in the account, she be allowed for the cost of the improvements.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY**v.****ABRAHAM S. JACKSON and others.**

A complainant's right to interest as well as principal, under a foreclosure decree.—*Held*, not to be affected by a decree in another suit to establish the title to the premises as between the defendant and third parties, in which the decree declared that complainant's mortgage was a lien on the premises for the amount of the principal only.

BILL to foreclose. On final hearing.

Mr. F. K. Hurrell, for complainants.

Mr. A. T. McGill, for Freytag and wife.

THE CHANCELLOR.

This is a suit for foreclosure and sale of mortgaged premises. The mortgage was given by Abraham S. Jackson while he had the legal title to the property, and the amount of the principal which it was given to secure was advanced by the complainants to him to enable him to purchase the property, under a foreclosure sale on a mortgage held by them and given to them by Freytag and wife, and all of it was used for the payment of the amount due the complainants on the execution, which greatly exceeded it. The answer of the defendants Freytag and wife, admits the making of the mortgage in suit, and states the fact of the existence of an action brought by Freytag, after the

Weston v. Wilson.

making of the mortgage, to recover the property from Jackson on the ground that the latter held it in trust for him, and that that suit had resulted in a decree in favor of Freytag, in which the complainants' mortgage was declared to be a lien on the mortgaged premises for the principal thereof only, and insists that there should be no decree for interest. No opinion was written or report made by the master to whom the cause was referred for an advisory opinion. The bill did not pray relief against the complainants' mortgage, and, though the decree does indeed declare that that mortgage shall be a lien for the principal thereof, it was as between Jackson and the Freytags, and not as against the complainants. The design was to fix the amount of encumbrance which, as between Jackson and the Freytags, should be left upon the property. The interest was, as between them, to be paid by Jackson, but the complainants have a lawful and equitable lien for both interest and principal not affected by that decree, and there will be a decree in this suit accordingly.

JAMES WESTON

v.

MARY WILSON and others.

Relief prayed by a bill to rectify a deed, whereby, through the mutual mistake of the parties, a lot of land was conveyed instead of an adjoining one, can only be granted by transferring to such adjoining lot the encumbrances put on the former by the parties.

Bill for relief. On final hearing on pleadings and proofs.*Mr. T. D. Hoxsey*, for complainant.*Mr. J. H. Rogers*, for defendant.

Weston v. Wilson.

THE CHANCELLOR.

This litigation arises out of the sale by the defendant's testator, Thomas Wilson, to the complainant, in the spring of 1875, of a tax title under the charter of the city of Paterson, for ninety-nine years, for a lot of land in Paterson, designated in the deed from the city to Wilson as number 158 Atlantic street. The bill alleges that Wilson fraudulently represented to the complainant that a lot adjoining lot number 158, and numbered 160, was that lot, and that the latter, confiding in the representation, entered upon number 160 and built a dwelling-house there; that, after the complainant had begun the building, he was informed by one Michael McDermott that he was the true owner of the property; that the complainant then taxed Wilson with the fraud which he had practiced on him, and that the latter admitted it, and promised to obtain the title to the land from the owner; that he did so, but, without the complainant's knowledge, took the title to the property in his own name; that the complainant then, supposing the title to the land was in himself, gave to Wilson a mortgage, as he supposed, on the McDermott property, for over \$800, in which were included \$500 paid by Wilson to McDermott for the property, but he has since learned that Wilson (as the complainant alleges, in furtherance of his fraudulent design) caused the mortgage to be drawn and executed on lot number 158; that the complainant left this country in 1876, and on leaving put the property in charge of one of his friends, but Wilson subsequently forcibly took possession of it, and ever since has retained possession. The bill prays that Wilson may be decreed to hold the property as trustee of the complainant until he shall have accounted to the latter for the moneys expended by him on it, or shall have granted the land to the complainant on such terms as may seem equitable. There is no prayer for general relief.

Wilson, who died after filing the answer, answered the bill according to requirement, on oath, denying the fraud, and alleging that the location of the lot under the tax deed

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was a mere mistake, which he only discovered after the complainant had begun building; that he, as soon as he was satisfied of it, set about buying the property, under an agreement between him and the complainant that, if he would buy the property and convey it to the complainant, the latter would pay him, or secure to him by mortgage, \$200 as additional purchase-money for it (the complainant paid \$300 when he got the deed for the tax title); that he accordingly bought the property and would have conveyed it to the complainant, but the latter not only would not pay or secure the \$200 to him, but abandoned the property and left the country not to return again. He further answers that the mortgage mentioned in the bill was not given for the price of the land bought from Mr. McDermott, or any part of it, but for money (\$840) which, on the giving of the deed for the tax title, he agreed with the complainant to lend him, and which he advanced to him accordingly, to enable him to build the house, and that the mortgage was given at the same time as the deed for the tax title.

The proof in the cause fails to show any actual fraud on the part of Wilson, or any fraudulent design. He appears to have believed and to have persisted in believing, perhaps against enlightened advice and assurance to the contrary, that the McDermott lot, though it was not number 158 but number 160, was indeed the lot which he had bought at the tax sale, and he seems not only to have been determined to defend the claim which he asserted to it under the tax title, but to have acted accordingly. In agreeing to advance, and actually advancing, \$840 to enable the complainant to build the house on the lot, solely on security of mortgage on the tax title, he gave the best assurance of his confidence in the claim which he so asserted. When, after an action of ejectment had been brought by McDermott against the complainant to recover possession of the property, he became satisfied that the land could not be held under the tax title, he, in order to protect the complainant, bought the property from McDermott, and would have conveyed it to the

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complainant by deed with warranty, on receiving from him \$200 or security by mortgage on the property therefor. That sum, with what the complainant had already paid for the tax title (\$300), would be \$85 less than the price which Wilson paid McDermott for the property. The evidence shows that the complainant verbally agreed to that proposition, but did not pay the money or give the mortgage for it, and therefore did not get a conveyance of the fee of the property from Wilson. It also shows that in the spring of 1877, the complainant sold the machinery with which he carried on his business and left the country not to return and entirely abandoned the property. This suit, though prosecuted in his name, is really prosecuted for the benefit of two of his creditors (under a letter of attorney from him to one of them) to the extent of their debts and interest, and the costs and expenses of suit.

On behalf of the complainant it is urged that, under the circumstances, equity requires that he receive the benefit of the conveyance from McDermott to Wilson, and that the mortgage to Wilson be treated as a mortgage, not on the property conveyed by that deed, but on the property (number 158) mentioned in the tax title deed; that is, that the complainant be decreed to enjoy the McDermott property clear of any claim on the part of Wilson's estate thereon. But he that would have equity must do equity. All that the complainant can ask is that he be placed in as good a position as he would have been in had he received a valid tax title for ninety-nine years to the McDermott property. Therefore, while he should have the benefit of an equitable estoppel as against the estate of Wilson to the extent of the term mentioned in the tax title deed, it should only be on such equitable terms as at the same time to give effect to the Wilson mortgage as a mortgage thereon. There is no evidence of any refusal by Wilson to do whatever might be necessary or desirable to confirm the title of the complainant to the McDermott property for the term mentioned in the tax title deed. Shortly before Weston left the country he

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went to Wilson's house and had an interview with him on the subject of his title. Wilson then assured him that it was good for ninety-nine years. When Harwood, the creditor before mentioned to whom the letter of attorney was given, and who was present at that interview, subsequently and after Weston's departure from this country, called on Wilson on the subject and demanded the mortgage, in order that he might get it cancelled of record, Wilson, of course, refused to comply with the demand. It does not appear that any demand or request was ever made to him to convey to Weston a term in the property equal to the term mentioned in the tax title deed. In equity the defendant should convey such title, but at the same time the title so conveyed should be declared to be subject to the Wilson mortgage. Under the circumstances no costs will be awarded to either side.

JAMES W. LOVEJOY

v.

DIAH LOVEJOY and others.

To secure an existing indebtedness, a deed (in fact a mortgage) was given by D. to J. By an error in the description, it covered only eleven feet of the frontage of one of the lots. Other creditors afterwards recovered judgments against D., and levied on the lot as described in J.'s deed. Then J. recovered a judgment against D., for the same debt, and levied on the whole lot, the mistake having been, meanwhile, discovered and rectified by another deed from D. to J.—*Held*, that J.'s lien on the eleven feet was prior to that of the other judgment creditors, by virtue of his mortgage; and on the remainder of the lot, by virtue of the levy under his judgment.

Bill to foreclose &c. On final hearing on pleadings and proofs.

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Mr. C. A. Bergen, for complainant.

Mr. S. H. Grey, for answering defendants.

THE CHANCELLOR.

In April, 1873, the defendant, Diah Lovejoy, being indebted to the complainant, his brother, in the sum of about \$4,350, besides interest, and being unable to pay it, conveyed to the latter, in fee (but, as they allege, merely as security for the payment of the debt), by deed executed by him and his wife, a farm in Stockton township, in the county of Camden; a lot of land on Second street, in the city of Camden, and certain vacant lots on Vine street, in that city; and also intended to convey a lot of land on the latter street, thirty-one feet front and rear by one hundred and five feet in depth, on which there was a dwelling-house. By an error in the description in the deed, only part (a piece eleven feet front and rear) of the last-mentioned lot was conveyed. On that piece a part of the dwelling-house stands. The error in the description was not discovered until February, 1874. In the meantime, certain other creditors of Diah Lovejoy had recovered judgments against him, which were liens upon his land in Camden county. Immediately after the mistake was discovered, he and his wife executed and delivered to the complainant a deed of confirmation, dated January 18th, 1874, but acknowledged on the 18th of February, in that year, stating the error and conveying the lot by a correct description. On the 15th of September, 1876, the complainant recovered a judgment against Diah Lovejoy, in the circuit court of Camden county, for the same debt which the deeds were given to secure, and caused a levy to be made, under the execution issued thereon, upon the last-mentioned lot, by a correct description. The levies made on the executions issued on the judgments of the other creditors were only upon that part of the lot described in the original deed to the complainant from Diah Lovejoy therefor.

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The complainant filed his bill in this cause for reformation of the erroneous description, and for foreclosure and sale of the premises conveyed to him by the several deeds, alleging that those deeds, though absolute conveyances in form, were, in fact, only mortgages. The other judgment creditors are parties to the suit. He sets up, in his bill, his own judgment and the execution thereon and levy thereunder.

The defendant's judgment creditors answered, alleging that the deeds to the complainant were fraudulent, and intended to hinder, delay and defeat the creditors of Diah Lovejoy, and that the conveyance of January, 1874, by the latter to the complainant, was subject to the lien of their judgments.

The proof of a *bona fide* indebtedness from Diah Lovejoy to the complainant, as alleged in the bill, is entirely satisfactory. There seems to be no room to doubt that the complainant did, in fact, in entire good faith, lend to his brother the sums of money, at the times and in the manner stated in the bill. It also appears that the deeds were taken by him as security for the debt, and that he had no ulterior or other design in accepting them. None of the land, it should be remarked, except the last-mentioned Vine street lot, remains to the complainant. All the rest has either been conveyed by him in satisfaction of prior encumbrances, or has been sold by virtue of judicial proceedings on such encumbrances, and he has realized nothing therefrom. The complainant and Diah both swear that the former did not purchase the property, and that the deeds to him were intended for mortgages only, to secure the debt due to the former from the latter. Diah swears that he proposed to give the complainant a mortgage on the property, and that he gave deeds instead of a mortgage, by the advice of the attorney whom he employed to draw the papers, that form of security being advised to save expense of foreclosure.

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The complainant testifies that Diah, when he gave him the deeds, said it was the best he could do for him, that they were but second mortgages at best, and added that he had put the conveyances in the form of deeds instead of a mortgage, by the advice of the attorney before mentioned, for the reason that the property was heavily encumbered, and that it was customary in such cases to make deeds instead of mortgages as security, and the deeds were the same as mortgages. The attorney testifies that the deeds were made to secure the complainant's debt, money that Diah had borrowed of him. The complainant appears also to have kept an account of the rents received by him from, and money by him paid for or on account of, the properties, crediting Diah with the former and charging him with the latter. He appears to have lent to Diah, for the accommodation of the latter, almost, if not quite, all his property. He complained to Mr. Fredericks, the sheriff, as is proved by the defendants, that Diah had stripped him of everything—had taken every dollar he had. In taking the deeds, he seems to have been actuated merely by a desire to secure his debt. If Diah entertained the design of protecting the property from his other creditors by the conveyance, the complainant does not appear to have participated in it. Through his attorney, he offered to the answering defendants, through their attorney, when they were about to sell the property under their judgments, to convey the property to them on payment of his debt. He would be entitled in equity to have the property sold to pay his debt, if the honesty of the conveyance were left in doubt. *Demarest v. Terhune*, 3 C. E. Gr. 532. The complainant is entitled to a decree for the foreclosure and sale of the Vine street house and lot. His mortgage gives him priority so far as the part conveyed by the original deed to him therefor is concerned. As to the rest, though the lien of the judgments of the answering defendants is superior to his under his mortgage, he is entitled to priority by virtue of his judgment. He insists that, having proved that the omission of part of the lot from the

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description in the deed of 1873 was a mere mistake, he is in equity entitled, as against the answering defendants' judgment creditors, to a reformation of that deed or to the benefit of the deed of confirmation as a reformation. He insists that they must be held to have had notice by the mere circumstances of the intention to convey the whole of the lot. The circumstances relied on are that Diah Lovejoy owned but eleven feet of the lot as described in the original deed to the complainant, the error being a mistake of twenty feet in locating the property in the description, and that the judgment creditors in their levies described the property in the same way, intending thereby to include the whole lot and not eleven feet thereof only. These circumstances cannot be regarded as notice. The complainant took his original deed as security for an existing debt (it was two years old), and parted with nothing of value for it when it was given. He has, therefore, no equity, so far as his mortgage is concerned, superior to that of the answering defendants as judgment creditors (*Wheeler v. Kirtland*, 9 C. E. Gr. 552); but he has a legal right superior to theirs under his judgment and execution and levy thereunder. Though his judgment is junior to theirs, he has a levy thereunder on the part of the lot not covered by the description of his original deed therefor, while they have not, and he is, therefore, entitled to priority of lien thereon. *Rev. p. 1044*, § 9; *Clement v. Kaighn*, 2 McCart. 47. As to part of the lot, then, he is entitled to priority by virtue of his mortgage; and as to the rest, though subsequent under his mortgage, he is prior by virtue of his levy.

There will be a decree accordingly.

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ANTHONY A. HUGHES

v.

WILLIAM YOUNG and wife.

1. A person was employed to find a purchaser for a piece of property, the price to be fixed by the vendor. Having found a purchaser, with whom the vendor agreed as to the price,—*Held*, that the conduct of the agent having been fair, no further duty was imposed upon him in the matter, by reason of such special, qualified agency.

2. The purchaser was to give a mortgage for part of the purchase-money. He offered to pay the whole in cash, if desired.—*Held*, that, under the circumstances, the fact of his insolvency would not avail as a defence against specific performance.

3. The buyer did not disclose the fact that he was, in fact, purchasing for another person.—*Held*, that he was under no duty to disclose his principal.

Bill for specific performance of agreement for sale of lands, and bill, in the nature of a cross-bill, to set aside the agreement. On final hearing on pleading and proofs.

Mr. J. Garrick and Mr. William A. Lewis, for complainant.

Mr. Charles H. Hartshorne, for defendants.

THE CHANCELLOR.

The original bill is filed to compel specific performance of an agreement made on the 27th of August, 1877, between the defendants in that bill, William Young and his wife of the one part, and Anthony A. Hughes of the other, for the sale and conveyance by the former to the latter of a lot of land and premises on Newark avenue, in Jersey City. On the avenue there is a brick building, and on the rear of the lot a wooden building. The price fixed in the agreement was \$13,000, of which \$6,000 were to be paid in cash, and the balance to be secured by a bond and mortgage on the premises, payable in

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five years, with interest. The deed was to be delivered on the 15th of September, 1877. The agreement provided that the property was to be sold free and clear of all encumbrances to the date of the deed, and that Joseph Warren, the agent for selling the property, was to receive \$200 as his commissions for selling. By an endorsement on the agreement, it was declared that the property was sold subject to a lease given to one Piaget, and, by another endorsement on the instrument, Hughes agreed to take the property subject to that lease.

A bill in the nature of a cross-bill was exhibited against the complainant, Joseph Warren, before mentioned, William E. Flemming and Joseph Moore. It seeks to set aside the agreement on the ground of duress and evil practice on the part of Warren and Hughes. It states that Warren, being a general agent for the sale and exchange of real estate in Jersey City, in the summer of 1877 applied to the complainant, William Young, and offered to procure a purchaser for the property, and that the latter accepted the proposition, but declared that he would not sell the property for less than \$18,000; that Warren at that time was, and for a long time previously thereto had been, the agent of Young to let the house on the rear of the lot, and had collected the rents thereof for him, and that he had been previously employed as his agent for the renting and collection of the rents of other pieces of Young's property. It further states that, on or about the 25th day of August, 1877, Warren called on Young and his wife and urged them to sell the property for \$12,000; that they refused to sell at that price, and that Warren then requested them to show him the lease before mentioned, made to Piaget, which was for the term of five years, to commence on the 1st day of May then next, on which was reserved an annual rent of \$1,350, to be paid in equal monthly payments; that Warren, on examining it, falsely stated that the lessee was not worth a dollar, and that by the terms of the lease the lessee could remain in possession of the land for twelve months,

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without paying any rent, and added that no one would buy the property with that lease upon it. It further states that Young and his wife are persons of advanced age, he being seventy and she sixty years old; that the former is quite deaf and can only hear with difficulty what is said in conversation; that neither of them is of strong or vigorous mind and will, and both are ignorant of business, such as the sale of property; that the wife can neither read nor write; that Warren is a shrewd, sharp and experienced man and real estate agent, and has been for many years engaged in that business; that Young and his wife, fearing that Warren's misrepresentations about the lease might be true, were greatly alarmed and confused by them; that on the 27th of August, two days afterwards, Warren, in company with the complainant, Hughes, called on Young and his wife at their house and asked them to sell the property to Hughes, and to name their price for it; that she named \$20,000; that Warren thereupon arose from his chair, and in an excited manner walked up and down the room, and spoke loud and angrily, and told Young's wife to "say something reasonable," or words to that effect, and otherwise, by gesture and words, acted and spoke in a manner calculated to alarm, confuse and intimidate Young's wife; that Warren said that Hughes would pay \$13,000 for the property, and that was all it was worth, and urged Young and his wife to sell for that sum; that they were excited and confused by his manner and language, and were influenced to yield to his urgency by his previous misrepresentations about the lease; that he then prepared a writing purporting to be an agreement (being the agreement mentioned in the bill in the suit for specific performance) between them of the one part and Hughes of the other, whereby they were to sell the latter the property, free from encumbrance, for \$13,000, of which \$6,000 were to be paid in cash and \$7,000 to be secured by Hughes's bond and a mortgage upon the property payable in five years; that Warren inserted in the agreement a statement that he, as the agent for selling the property, was

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to receive from Young and his wife \$200 commission; that Young and his wife objected to signing the paper, saying that Young wished to consult with his friends and counsel about it before doing so, but Warren and Hughes both urged him to sign at once; that Young and his wife, in their confusion and excitement, yielded to their importunities and signed the paper, and that Hughes then paid to Young and his wife \$25 on account of the price.

The cross-bill charges that Warren, after becoming the agent of Young for the sale of the property, fraudulently, and without the knowledge or consent of Young and his wife, agreed with Hughes, or with some other of the defendants in the cross-suit, to procure a sale of the property by Young and his wife for a sum less than that which they were willing to accept; that Hughes is, and was at the time of the sale, insolvent, and that Warren was well acquainted with him and knew that fact, but concealed it from Young and his wife; that they did not know or suspect it until after they had signed the agreement. The bill further states that the wife of Hughes (to whom Hughes had, subsequently to the making of the agreement, directed that the deed should be made instead of to himself) has not the means with which to purchase the property, and that neither he nor his wife has relations possessed of such means as that they would be likely to advance to them money sufficient for the purchase; that the front house on the property, being the brick house, was, at the time of filing the bill, leased to Joseph C. Moore, one of the defendants, who kept a store there and carried on the business of pharmacy therein, and whose term in that property expired on the 1st day of May then next; that Moore's wife is a daughter of the defendant Flemming, and that Flemming and Moore reside together in the same house in Jersey City; that Moore is generally reputed to be a man of small means, but Flemming is said to be possessed of large wealth; that about the time of making the lease to Piaget, during the month of July, 1877, Flemming applied to Young and requested him to sell the

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property to him for \$12,000, which Young refused to do; that Moore, shortly before the sale to Hughes, in conversation with Young, decried the property, and said to Young that if it had been sold for \$12,000 to Flemming, Young would have been better off by \$400 a year, and added that Flemming would not have the property then (at the time of the conversation) for the taxes. The bill further states, in substance, that the purchase was, in point of fact, made by Flemming or Moore through Hughes, and that Warren knew, at the time of the sale to Hughes, that Hughes was, in fact, purchasing the property for Flemming or Moore, and that he fraudulently concealed that fact from Young and his wife. It charges that Hughes and Flemming and Moore fraudulently combined with Warren, as the agent of Young for the sale of the land, to procure from Young a sale for less than its fair value.

After a careful consideration of the testimony in the case, I am satisfied that the relief prayed by the cross-bill should not be granted. It appears that Warren occupied towards Young the relation of agent only in respect to the renting of part of his property and collecting the rents; that, as to the sale of the property, Warren was vested with no discretion, and had no power to bind Young, and was not in any way charged with a care for Young's interest in selling. The price, according to the cross-bill, was fixed by Young himself, and it appears, by the testimony, that Warren had leave only to find a purchaser for the property, but the price was to be fixed by Young.

Nor does the proof appear to justify the statements and charges in the cross-bill in respect to the alleged duress under which the complainants in that bill say the agreement was made. The conduct of Warren appears to have been fair. Although, when the lease to Piaget was shown to him by Young and his wife, he, at first, thought, and so said, that the rent was payable only at the end of the year, it being, by the terms of the lease, made payable "twelve-monthly," he subsequently and in the same conversation

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concluded that he was in error on that point, and that the rent was payable monthly, and so informed Young and his wife. He denies that he said that Piaget was a man of no property, although he admits that he expressed some doubts on the subject. The evidence as to the want of capacity of Young and his wife to transact business, fails to establish their want of competency, but, on the other hand, shows that they were capable of managing their own business; and the defect of hearing of the former is shown to be greatly exaggerated.

Much stress was laid, on the argument, upon the circumstance that Hughes, who appears to have purchased for Moore, did not disclose the fact that he was not purchasing for himself. The concealment, however, was of no importance. The property was subject to a long lease to Piaget, so that Moore, whose lease expired in May, 1877, could not have expected to obtain possession of the property for a long period of time. It is not to be presumed, therefore, that a large price could have been obtained from him for the property, by reason of the fact that he was established there, and it would be to his disadvantage to be compelled to remove to another place of business. Besides, the agent was under no duty to disclose his principal in the premises.

Nor will the fact of the insolvency of Hughes, if it be conceded, under the circumstances, affect the liability of Young to be compelled to specifically perform his agreement, for it appears that Hughes offered to pay the entire amount of the purchase-money in cash. Nor does there appear, in the price at which the property was sold, to be any ground for objection to the agreement on the score of inadequacy.

The price mentioned in the agreement is \$13,000. A number of witnesses are produced, on the part of Young, to testify as to the value of the property. Mr. Weart estimates the value of the lot at \$12,000, and that of the buildings at from \$3,000 to \$4,000. He says that he is not very familiar with the buildings, particularly the rear building;

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but he thinks the property ought to bring \$15,000, if a reasonable credit were given. He also says that the buildings are old. Mr. Kingsland puts the value of the lot at from \$12,000 to \$13,000, and the value of the buildings at \$3,000. He says, however, that he has not had occasion to examine the property for many years, though he adds that he knows it very well. Mr. Dugan gives it as his opinion that the lot, without the buildings, would probably bring \$10,000 to \$12,000; that it was assessed at \$9,500, and the assessor is supposed to assess the property at the amount which it would bring, in cash, if sold on the day the assessment is made, but, he says, the practice has been to assess at one-third less than the market value. He adds that, in his judgment, the lot, with the buildings, is worth \$15,000; but, at the assessment, with the addition of one-third, it would be worth only \$12,666. He says he does not regard the rear building as being worth anything; that it has no value. Mr. Hemmingway is the owner of property on Newark avenue, the lot next to the property in question. He has improved his property, building upon it a four-story brick building, which cost him about \$11,000. He gave for his lot \$14,800, eight years prior to the time when he testified in 1878. He says he considered that, when he bought, he paid an enormous price for his property, and so considered it afterwards, and has often been sorry that he bought it; that it has depreciated in value since he purchased it; that, at the time when he testified, he considered the value of the land, not counting the building, at \$10,000 to \$12,000, and he considers the value of Young's lot, without the buildings, \$10,000 or \$11,000; that, if he had more money than he knew what to do with, he might give \$11,000 for it, and that the building is a mere shell. He says that he considers the Young property (the property in question in this suit), according to the present market, not worth over \$12,000 or \$14,000 at the outside, and that he would not give over \$13,000 for it, though he might give \$13,500. Mr. Carswell puts the value of the property at

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\$11,000. Mr. Crane values it at about \$12,000. Mr. Leake is the owner of a neighboring property, on the same street, of at least equal value with that in question. He swears that \$11,600 was the best price he could get for it at a public sale, in March, 1877, though three years and a half before that time he was offered, by Mr. Warren, \$22,500; and he adds that he sold the property, in November, 1877, for \$10,750.

The bill in the nature of a cross-bill will be dismissed, with costs, and there will be a decree for specific performance in this suit.

JAMES N. LAWRENCE and wife

v.

EPHRAIM P. EMSON.

The power "to settle" on an assignment of a complainant's interest in a contract,—*Held*, not to authorize the assignee to include it in a general arbitration of all the matters in difference between him and the other party to the contract.—*Held*, also, that an award thereon obtained against the protest of the complainant, and by the assignee's deception, constitutes no bar to a specific performance of such contract.

Bill for relief. On final hearing on pleadings and proofs.

Mr. S. A. Allen and Mr. F. Kingman, for complainants.

Mr. W. H. Vredenburg, for defendant.

THE CHANCELLOR.

On the 6th of October, 1868, Ephraim P. Emson executed an agreement with James N. Lawrence and Annie, his wife, by which it was recited that they had that day sold and conveyed to him all their right, title and interest in certain

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tracts of cedar swamp described in the deed from them to him, and he thereby, in consideration thereof, agreed with them that, in addition to the sum of \$500 by him paid to them on the delivery of the deed, he would prosecute to a final conclusion the suit in this court in which Mr. Lawrence was complainant and Phebe Ann Lawrence and others were defendants, at his own cost and pay all expenses, and would bring it to a close as soon as practicable, and that he would, at the termination of the suit, well and sufficiently convey to them or the survivor of them, or to their heirs or assigns, one-half of all the lands which might be recovered in the suit or by compromise or settlement thereof, or of the proceeds thereof in case a sale should be ordered by the court or agreed upon between the parties; and, in addition thereto, would also pay to Mr. Lawrence, his heirs or assigns, \$500 in cash at the end of the suit. The suit resulted successfully for the complainant therein. Mr. Emson did not comply with the agreement, and, on the 27th of May, 1872, Lawrence and his wife filed their bill in this court against him for specific performance thereof. Emson filed his answer thereto on the 14th of August following, and they filed their replication on the 25th of September.

On the 27th of December, 1872, Lawrence and his wife, by their assignment of that date, assigned to William Warwick, for valuable consideration, as it was stated in the instrument, the agreement and all moneys due and to grow due thereon, and all their right, title and interest to the lands and premises mentioned therein, and all benefit of all proceedings to be had thereon. And they thereby authorized and empowered him to do all and every act and thing necessary and proper for the recovery of the lands and for the recovery of moneys due and for settlement with Emson.

On the 18th day of July, 1874, they filed an amended bill to restrain proceedings in partition at law which were in progress for the partition, between Emson and his grantees, of part of the property, and to restrain Emson from cutting down timber on any part of the property. More than a

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year before the filing of the amended bill, and in the month of May, 1873, Warwick and Emson entered into an arbitration of all matters in difference between them, and, on the 16th of that month, the arbitrators awarded that Emson should pay to Warwick \$942.33, on or before August 16th, 1873, in full discharge of all demands by either of them against the other.

On the 7th of June, 1873, Emson paid that money to Warwick, who thereupon, in consideration thereof, acknowledged satisfaction of the agreement which Lawrence and his wife had assigned to him and of all rights that had accrued or might accrue to him thereon, and surrendered the agreement to Emson. By the answer (filed September 28th, 1874) to the amended bill, Emson alleged that, since the filing of the original bill, the whole subject matter of that bill and of the amended bill had been compromised, adjusted and fully settled, between the parties to the bills, by an award of arbitrators, and that, before the filing of the amended bill, he paid to Lawrence and his wife \$942.33 (the sum awarded to be paid by him to Warwick) in full satisfaction and discharge of the agreement and of all claims on which the suit was founded, and that, in consideration thereof, the agreement was released by release under seal and fully satisfied and discharged and duly surrendered by them to him, and that it was then duly cancelled by him. The defendant, in support of this defence of arbitrament and award, relies on the arbitration between him and Warwick and the award thereunder. The complainants insist that Warwick had no right to submit the claim assigned to him to arbitration, without their consent, and that Emson and the arbitrators were notified of the fact; and they insist, further, that the arbitration was unfairly conducted; that the arbitrators adjourned it, at Emson's request, for a week, and that thereupon Mrs. Lawrence and her counsel, who were her son James and Joel M. Van Arsdalen, who attended the arbitration, went away accordingly, expecting to return at the day to which the adjournment was made, and that she

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and they did not return, because, and only because, Warwick, within the week, informed James Lawrence, by letter, that the arbitration was ended. The complainants say that the assignment to Warwick was made to him merely as security for money due him from James N. Lawrence, and that, when it was made, he executed and delivered to the complainants an instrument of writing in which he agreed to pay over to them all that he should recover in case of settlement or compromise, over and above the amount so due him; and, also, that he would not settle or attempt to settle with Emson without the full consent and approbation of Mrs. Lawrence first had and obtained. James Lawrence and Mr. Van Arsdalen both say that that agreement on the part of Warwick was read to the arbitrators as notice that Warwick had no right to submit the claim to arbitration.

If Emson had notice that Warwick was not the absolute owner of that claim and had no right to submit it to arbitration without first obtaining the consent of Mrs. Lawrence, the arbitrament and award will constitute no bar to this suit. James Lawrence and Van Arsdalen and Mrs. Lawrence all swear that the agreement made by Warwick was to the effect that he would pay over to the complainants all that he might receive on the claim, over and above his demand, and that he would not settle with Emson without Mrs. Lawrence's full and free consent. Both James Lawrence and Van Arsdalen swear that the agreement on the part of Warwick was read before the arbitrators. On the other hand, Emson and Warwick and the two of the arbitrators who testified (the other is dead), all deny it. Mrs. Lawrence says, indeed, that the agreement (which is lost) was in her possession at New Egypt, where the arbitration took place, and that she neither handed, gave nor showed it to any one, and does not know that she took it out from among her papers, but she also swears, as do James and Van Arsdalen, that she told the arbitrators that Warwick had no right to submit the claim to arbitration without her consent.

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The testimony of Mr. Emson on this subject is noteworthy. On his cross-examination he says he does not recollect that Mrs. Lawrence stated to him that Warwick had no right to arbitrate the matter; that he does not recollect that she objected to the arbitration going on. It will be seen that his denial is qualified; and here it may be remarked that it appears, by the testimony of the arbitrators, that there was a dispute between Mrs. Lawrence and Mr. Emson in regard to a claim against her husband, which Mr. Emson proposed to offset against the claim against him. Now, unless she had an interest in the claim which it was proposed to arbitrate, it is difficult to account for her intervention and the manifest recognition on the part of Emson and Warwick of her right to be heard. The fact that three years and a half elapsed between the time of the arbitration and the time when the witnesses, James Lawrence, Mrs. Lawrence and Van Arsdalen, were sworn, is enough of itself to account for the discrepancy in their testimony in reference to the reading of the agreement to the arbitrators. It is true, Mr. Richey, the lawyer who drew the agreement signed by Warwick (he does not speak positively), says he does not remember that the instrument contained any provision against settlement without Mrs. Lawrence's consent. It is not surprising that, after the lapse of six years, he should have no particular recollection in regard to a paper drawn merely in the course of his daily business. He says, however, that he thinks that an arbitration was spoken of at the time, but whether it was mentioned in the paper or not, he does not recollect. It was urged on the part of the defendant, on the hearing, that the power to settle involved the power to submit to arbitration, but if Emson understood that Warwick was not acting wholly for himself, but was executing a power, even though coupled with an interest, he was bound to take notice of the limitations of the power. Warwick's power to settle did not, especially under the circumstances, authorize him to submit to arbitration. *Story on Agency* § 99; *Morse on Arbitration* 11; 2 *Parsons on Con-*

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tracts 200. Had the complainants taken part in the arbitration without protest, they would have been bound by the result. But they did not do so, and there is strong reason for believing that they were designedly prevented from being present after Mrs. Lawrence made objection. She and her counsel all swear that the arbitrators adjourned for a week, on the application of, and to accommodate, Mr. Emson, and they left the place with that understanding.

Mr. Hurley, one of the arbitrators, on cross-examination says that he does not think that the arbitrators adjourned, though there was some talk about it. But, on the other hand, on the 24th of April, 1874, in an affidavit made by him in this suit, to be used on behalf of Emson on the argument of an order to show cause why the bill should not be dismissed for want of prosecution, he swore that "the arbitration was adjourned in the morning to some other day."

Mr. Meirs, the other arbitrator who was sworn, says he does not recollect that any adjournment took place, and Mr. Emson and Warwick say that there was no adjournment. But on this point the letter written by Warwick to James Lawrence is most important testimony. It is dated May 21st, 1873, five days after the day on which the arbitrators met. In it Warwick says that the arbitration ended without a settlement, and he offers to assign the claim to James Lawrence, or any responsible person whom the latter will name, if the latter will pay his demand, with something additional for his trouble, or give him satisfactory security for its payment at an early day. He says he can give him some valuable information, and says, also, that the claim is in better shape than ever, and adds that as they (James Lawrence and Van Arsdalen) are lawyers, they can make the case out, and they will make "something nice out of it, as they ought." He is urgent to have the matter attended to at once, if they conclude to take the assignment. It is said, by way of explanation of this extraordinary statement, that the arbitration was ended without a settlement,

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when, in fact, there had been an award in his favor five days before the date of the letter, and on the very day on which the arbitrators met; that Warwick had not then been able to get the money awarded, and, in fact, did not get it until the June following; but this is no explanation, because, by the terms of the award, the money was not payable until August following. He, in fact, not only got the money before it was payable by the award, but got it very soon (seventeen days) after he wrote that letter. The manifest object of the letter was to deceive Mrs. Lawrence as to the arbitration, and to lead her to believe that it had been entirely abandoned. Its initial statement was not true in any sense.

The arbitration itself was conducted almost entirely after Mrs. Lawrence and her counsel had gone away. Neither of the arbitrators can say why she and her counsel left before the arbitration was concluded. Neither can Emson nor Warwick. But that they did go is undeniable. The arbitrators swore no witnesses, but appear to have accepted an account against James N. Lawrence which was disputed by Mrs. Lawrence before the arbitrators, according to the testimony of the arbitrators, without even Emson's oath. The claim assigned to him by the Lawrences was all the demand that Warwick had against Emson.

Under the circumstances, the arbitration and award cannot be accepted as a bar to the complainants' claim. For the money paid to Warwick, Emson will have credit. James N. Lawrence, it may be stated, was, when the arbitration took place, out of the state, and he has ever since remained away. Emson has never sought or been willing to come to any account except in the arbitration with Warwick. He has always denied his liability under the agreement made by him with Lawrence. In his answer to the original bill, he denied that, on the day of the date of that agreement, or at any time, he entered into it or signed any such agreement, and, by his answer to the supplemental bill, he makes a similar denial. When examined as a witness in

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this suit, he refused to acknowledge that the signature to the agreement was his, but would only say that it "looked like" his.

The agreement is fully proved and the arbitration and award are no bar to the relief sought in this suit. There will, therefore, be a decree establishing it and for specific performance of it by equal partition between the complainants and Emson, according to the agreement, of all the lands therein mentioned and conveyed by the complainants to him and remaining unsold when this suit was begun, and he will be required to account to them for one-half of the value of the land sold by him before the commencement of this suit, and for all other moneys due to them under the agreement. As before stated, he will have credit for the amount paid to Warwick.

MARGARET PURCELL and others

v.

PATRICK ENRIGHT and others.

Parties who, with notice of the client's possession through his tenants, purchase premises from an attorney who had cancelled a mortgage thereon left in his custody by his client and procured a conveyance of the premises to himself, are bound by the client's equities.

Bill to set aside a cancellation of, and to foreclose a mortgage.

Mr. H. S. White and Mr. John A. Blair, for complainants.

Mr. E. S. Cowles, for defendant Van Horn.

THE CHANCELLOR.

On the 27th of July, 1874, Jeremiah Purcell, being the owner of a lot of land and premises in Bayonne, in Hudson

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county, conveyed it to his brother-in-law, Patrick Enright, by deed of that date, for the consideration, as expressed in the deed, of \$2,500. A mortgage for \$1,000 on the premises was computed and allowed as so much of the purchase-money, and, for the rest, the grantee gave to Margaret Purcell, wife of the grantor, a mortgage on the property for \$1,500, payable in four years, with interest. The deed and bond and mortgage were drawn by the defendant Abraham Van Horn, a counsellor at law, and the papers were delivered in his office. The bond and mortgage were left by the mortgagee with him, as the mortgagee's attorney, to be kept for her. Subsequently, on the 1st of April, 1875, Mr. Van Horn, as attorney for the mortgagee, receipted the bond and mortgage, and wrote upon the latter a direction to the register of the county of Hudson to cancel it of record. It was cancelled, accordingly, on the 9th of that month. On the next day, Mr. Van Horn took a conveyance of the property from the mortgagor, Patrick Enright, to himself. The deed expressed the consideration of \$1,000. In consideration of the delivery of the deed, he gave up to the grantor \$900 of \$1,000 held by him as his attorney, and which were applicable, according to the agreement between Jeremiah Purcell and Enright (made on the delivery of the deed for the property from the former to the latter), to the payment of the \$1,000 mortgage. Mr. Van Horn, at the time of the delivery of the deed from Enright to him, was the owner of that mortgage. The remainder of the \$1,000 was retained by him, with Enright's consent, for premium which he would, as he said, be required to pay to the assignee of this \$1,000 mortgage on sale thereof.

It appears that Enright was desirous of being rid of the property and obtaining a discharge from his bond and mortgage of \$1,500, and was willing, also, to pay a premium of \$100 to a purchaser of the \$1,000 mortgage, which Mr. Van Horn appears to have taken because of some honorary obligation under which he was to the holder thereof. Mr. Van Horn held the title to the property until the 14th of

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February, 1877, when he sold and conveyed it to Patrick Purcell and Ellen (his wife), for the consideration \$1,340. This consideration was made up of the amount of the principal and interest of the mortgage of \$1,000, taxes and water rents paid by Mr. Van Horn upon the property, interest paid by him upon the mortgage of \$1,000 and the cost of drawing and recording the deed.

The complainants allege that, though it was agreed between them and Enright that Margaret Purcell would accept a reconveyance of the property to her from him in discharge of his liability on the bond and mortgage of \$1,500, and she gave directions to Mr. Van Horn to draw and obtain the execution of a deed from Enright to her accordingly, she did not instruct him to take a conveyance to himself, nor did she know that he had done so until after she was informed that he had conveyed the property to Patrick Purcell. They further allege that Mr. Van Horn had no authority or right to take the deed for the property to himself, or to cancel the \$1,500 mortgage of record.

The bill seeks, as before stated, to establish the mortgage and to foreclose it, and it prays, also, a decree for deficiency against Patrick Purcell and his wife and Mr. Van Horn.

The evidence as to the circumstances under which Mr. Van Horn obtained the title to the property is very conflicting, but the weight of it is in favor of the complainants. The consideration, also, that the relation of attorney and client existed between the complainants and Mr. Van Horn, puts the latter at an especial disadvantage. The complainants allege that he took the title to the property without their knowledge and against their will; that Margaret Purcell agreed with Enright to accept a conveyance of the property to her in discharge of his liability on the \$1,500 mortgage, and that she accordingly employed Mr. Van Horn to draw the deed, and paid him for the services. Enright says that he did not know that the deed was drawn as to convey the property to Mr. Van Horn. Though Mr. Van Horn says, in his answer, that the consideration

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Of the conveyance was the amount of the \$1,000 mortgage and his demand of \$175 for services rendered to the complainants, the deed expresses a consideration of only \$1,000, and there is no evidence in support of the demand. Though Mr. Van Horn, in his answer, says, also, that the complainants proposed that he should take the property, they deny it, and, in his testimony, he says that he himself proposed it, threatening foreclosure in case of refusal, in view of their inability to pay the interest on the \$1,000 mortgage, of which he was then the owner. He says that he bought that mortgage at their request. They, on the other hand, deny it, and the denial is supported by his subsequent testimony that he bought the mortgage of his own accord, and with a view to securing a debt which the person who was the real owner of it owed him. The evidence on the subject of the cancellation of the \$1,500 mortgage is very conflicting. The complainants say they never, in any way, authorized it, while Mr. Van Horn says that they did; that he wrote the endorsement on the mortgage authorizing cancellation, in the presence of Margaret Purcell, and she consented to it, and that he signed it as her attorney, because she could not write. He says this was after he obtained possession of the property, but he is probably mistaken as to the time, for the endorsement appears, by its date, to have been made on the 1st of April, 1875, and the mortgage was cancelled on the 6th of that month, while the deed to him was not given until the 10th, so that the cancellation was previous to the time when he obtained the title. It would, obviously, have been prudent in him, if she was willing to cancel the mortgage, to have obtained her signature to the endorsement, and to have had her signature witnessed. There is no evidence in support of his testimony, and, on the other hand, it is flatly contradicted by the complainants. It is needless to pursue the testimony further, or to multiply the illustrations of its contrariety.

The transaction, as between Mr. Van Horn and Margaret Purcell, must be dealt with according to the principles of

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equity which govern such dealings when the complainant - the client and the defendant the attorney. "On the one hand," says Justice Story, "it is not necessary to establish that there has been fraud or imposition upon the client and, on the other hand, it (the bargain) is not necessarily void throughout, *ipso facto*. But the burden of establishing its perfect fairness, adequacy and equity is thrown upon the attorney, upon the general rule that he who bargains in a matter of advantage with a person placing a confidence in him, is bound to show that a reasonable use has been made of that confidence—a rule applying equally to all persons standing in confidential relations with each other. If such proof is established, courts of equity treat the case as one of constructive fraud." *Story's Eq. Juris.* § 311.

The relief sought by the special prayer of the bill cannot be granted. Patrick and Ellen Purcell are purchasers for value paid without notice as to the \$1,500 mortgage. The mortgage must, indeed, be held to have been cancelled without authority from the mortgagee, but the cancellation was effected through an acknowledgment of full payment and an authorization signed by her attorney, who had, as such, possession of the mortgage. *Putnam v. Clark*, 2 *Ste.* 413. It had been cancelled of record nearly two years when the deed from Mr. Van Horn was given. Though cancelled through fraud, the cancellation will not be set aside as against a *bona fide* owner of the property for value paid without notice. *Putnam v. Clark*, *ubi supra*; *Fassett v. Smith*, 23 *N. Y.* 252; *Scholefield v. Templer*, 4 *DeG. & J.* 422. But the deed to Mr. Van Horn must be held to be fraudulent, and the title which Patrick and Ellen Purcell obtained under it must be held to be subject to the trust which equity will impress upon it in favor of Margaret Purcell. As to that they had notice. They knew that the complainants claimed to own the property, and that it was occupied by the tenants of the latter. George W. Hopkinson, the agent who rented the property, testifies that he paid the rent, up to January, 1877, to Margaret Purcell, and, after

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that, to Patrick Purcell. The deed from Mr. Van Horn to the latter and his wife, Ellen, is dated February 14th, 1877. Mr. Hopkinson says: "I saw Margaret Purcell, and it was understood all around; it was done (the paying of the rent, after January 1st, to Patrick) by general consent. I knew the place had been sold." Ellen Purcell, who appears to have acted for herself and her husband in the purchase, says that she thought the property belonged to Jeremiah Purcell up to the day when she paid Mr. Van Horn for it, and that she did not know, until she paid the money for it to Mr. Van Horn, that the latter claimed to own it. She says he told her he had owned it for two years, but did not say how he came to be the owner of it, nor that he had paid for it. Patrick Purcell says that when they bought the property they thought it belonged to Margaret Purcell, but after that (and not until after he had bought the property) Mr. Van Horn told him that the property belonged to him.

The relation of the parties must not be forgotten. Patrick Purcell is the brother of Jeremiah, and Ellen is the sister of Margaret. The possession of Margaret's tenants was notice to the purchasers of Margaret's rights. *Baldwin v. Johnson, Sax. 441*. What are her rights? The \$1,500 mortgage would have been merged in the conveyance by Enright to her if her directions had been carried out. She had a right to a conveyance of the land from Mr. Van Horn. He held it in trust for her, on a trust arising in equity, *e maleficio*. Of this trust the purchasers had notice, and the land is bound by it in their hands. Mr. Van Horn is bound to answer to Margaret Purcell for the full value of the property, and so are they. Patrick Purcell says the property is worth \$1,500 or \$1,600. His wife says it is worth between \$1,600 and \$1,800. It appears to have rented, when it was sold, for \$13 a month. This would be evidence that its value was about \$1,600. It was sold, for cash, for \$1,338.

It is in evidence that Margaret Purcell was anxious to sell the property at the time when it was sold. I am of

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opinion that equity requires that the land be charged, in hands of Patrick and Ellen Purcell, with the sum of \$393 (the difference between \$1,206.82 and \$1,600) with interest from February 14th, 1877, in default of the payment thereof by Mr. Van Horn, who should be decreed to pay to Margaret Purcell that amount as the difference between the money due to him when the sale was made and \$1,600. There were due to him, on the 14th of February, 1877, principal and interest on the \$1,000 mortgage, \$1,090; for taxes on the property paid by him for 1875 and 1876, \$96.22, and for water rents for 1876, \$20.43—in all, \$1,206.82. The taxes and the water rents were paid, in full, on, and the rest the next day after, the date of the deed to Patrick and Ellen Purcell. The claim for tax paid for 1875 is not allowed, because Margaret Purcell swears that she gave to Mr. Van Horn the money for the taxes up to 1875 and she has the tax bill for that year in her possession. Nor is the alleged payment of \$35 interest on the \$1,000 mortgage, by Mr. Van Horn, before November, 1875, allowed. Margaret Purcell swears that she paid Mr. Van Horn the first interest which fell due on that mortgage at the time Enright gave up the property. That must have been the interest due November, 1875. The \$100, money paid by Enright to Mr. Van Horn for premium to be paid on negotiation of the \$1,000 mortgage, is due to Enright, and that premium appears not to have been paid. Mr. Van Horn agreed to get that money back from the complainant for Enright, in four months. He did not do so, and he has not repaid it. Nor did he use it for the purpose for which it was given to him.

There will be a decree that, primarily, Mr. Van Horn, and, secondarily, Patrick and Ellen Purcell, pay to Margaret Purcell the sum of \$393.18 with interest from the 17th of February, 1877, together with the costs of this suit, and that that sum, with interest and costs, be charged accordingly against the property in question, which will, if necessary, be sold in execution to pay the money so charged thereon. As to Enright, the bill will be dismissed. He has not appeared.

Platt v. Bright.

JOHN H. PLATT, assignee,

v.

ANNA E. BRIGHT and others.

Where mortgaged premises are converted into money by virtue of condemnation proceedings, the rights of the mortgagee remain unaltered and he is entitled to the money as an equivalent for the land. And, where the full value of the land taken has been awarded and paid into this court, equity will protect the condemner against the lien of an encumbrancer who has not been made a party to the proceedings in condemnation. The power to extend such protection does not depend on the act of 1877 "respecting the awards of commissioners in cases of lands and real estate taken or condemned by law, and appeals therefrom," but is inherent in this court.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. R. Allen, Jr., and Mr. T. N. McCarter, for complainant.

Mr. W. H. Vredenburg, and Mr. F. Fellowes of New York, for Mr. and Mrs. Bright.

THE CHANCELLOR.

The question presented for decision is the same which was presented under other circumstances at an earlier stage

NOTE.—Although the title of lands is not necessarily involved in condemning them (*State v. Hudson Tunnel Co.*, 9 Vr. 17; *Selma R. R. v. Camp*, 45 Ga. 180; *Peoria &c. R. R. v. Bryant*, 57 Ill. 473; *Peoria &c. R. R. v. Laurie*, 63 Ill. 264; *St. Louis R. R. v. Teters*, 68 Ill. 144; *Directors v. R. R. Co.*, 7 W. & S. 236), yet the assessments, whether for damages or benefits, must be made to the actual owner (*Rosa v. Mo. &c. R. R.*, 18 Kan. 124; *Northern R. R. v. Gould*, 21 Cal. 254; *Rooney v. Sac. R. R.*, 6 Cal. 638; *Lull v. Curry*, 10 Mich. 397; *Webster v. Southeastern R. R.*, 1 Sm. (N. S.) 272; *Hagar v. Brainard*, 44 Vt. 294); and where the entire ownership or title is not vested in one person, the interest of each must be ascertained and compensated.

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of the cause, and on which an opinion was then at least intimated. *Platt v. Bright*, 2 *Stew.* 128. The suit is for foreclosure and sale of mortgaged premises. The bill was filed December 17th, 1872. After it was filed, part of the property was taken under proceedings for condemnation begun February 3d, 1873, by the New Egypt and Farmingdale Railroad Company. The report of the commissioners was made March 17th in that year. The award was in favor of Mr. and Mrs. Bright, the mortgagors, alone. The latter was the owner of the land. They alone were notified of the proceedings in condemnation. The charter provides for notice to the persons interested in the property to be taken. The complainant, after the award had been made, filed a petition in this court for the payment of the money into court, stating the appropriate facts, and alleging that the company was about to pay over the award to the mortgagors; that the mortgaged premises were but a slender security, and that the company, in adapting the land taken to its purposes, intended to make a deep cut therein which would do great injury. Under the petition, the money was paid into court. Subsequently the mortgagors applied by petition for the payment to them of part of the money paid in, on the ground that it was awarded in respect to other adjoining property, both properties being treated in the award as one.

As to the proper method of determining this as between

I. A mortgagor and mortgagee—see, in addition to the chancellor's citations in his opinion (*Merritt v. Northern R. R. Co.*, 12 *Barb.* 60; *Sherwood v. New York*, 11 *Abb. Pr.* 347; *Gimbel v. Stolte*, 59 *Ind.* 44; *Wilson v. European &c. R. R.*, 67 *Me.* 358; *Norwich v. Hubbard*, 22 *Conn.* 587; *Aspinwall v. Chicago &c. R. R. Co.*, 41 *Wis.* 474; *Parker's Case*, N. H. 84; *Central Park Case*, 16 *Abb. Pr.* 56; *Ala. & Fla. R. R. v. Honey*, 39 *Ala.* 307; *Pile v. Pile*, L. R. (3 *Ch. Div.*) 36; *Martin v. London R. R.*, L. R. (1 *Eq.*) 145; *Whitney v. New Haven (Conn.)*, 7 *Reporter*. *Mills on Em. Dom.* § 74).

II. A tenant for life and remainderman (*Folley v. Passaic*, 11 *C. Gr.* 216; *Passmore v. Phila. &c. R. R.*, 9 *Phila.* 579; *Chicago R. R. v. Smith*, 78 *Ill.* 96; *Railroad Co. v. Bentley (Pa.)*, 7 *Reporter* 246; *Mill*, *Em. Dom.* § 73).

III. Tenants in common or joint owners (*State v. Fischer*, 2 *Du.* 129; *Grand Rapids R. R. v. Alley*, 34 *Mich.* 16; *Southern Pac. R.*

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That application was granted and part of the money paid over, leaving \$6,610 in court as the value of land and damages awarded in respect to the part of the mortgaged premises taken. In the course of the proceedings in the cause, and in disposing of exceptions to a master's report, leave was given (*Platt v. Bright, ubi supra*) to make the railroad company a party to the suit, in view of its right to equities. In accordance with that leave, the complainant filed a supplemental bill, making the railroad company a party and stating the facts as to the condemnation and the disposition made, as before stated, of the money awarded. The counsel of Mr. and Mrs. Bright again claim, as on the argument on the hearing before referred to, that the fact that the award was made to them is conclusive as to their right to the money. The consideration that the amount awarded for consequential damages to the mortgaged premises and the adjoining tract is greater than the money in court, is also presented, and it is insisted that those damages are, in part at least, merely personal, having been given for compensation for the personal damage and inconvenience occasioned by the railroad to Mr. and Mrs. Bright and their family, or tenants residing on the part of the premises not taken, for risk of fire, increase of care and attention to live stock, &c. (*Doughty v. Somerville R. R. Co., 2 Zab. 495*), and, therefore,

v. Wilson, 49 Cal. 396; Reed v. Hanover R. R., 105 Mass. 303; Draper v. Williams, 2 Mich. 536; Chicago R. R. v. Hurst, 30 Iowa 73; Romig v. Lafayette, 33 Ind. 30; Rex v. Trustees, 5 Ad. & El. 563; Mills on Em. Dom. § 73).

IV. Tenants for years and reversioners (*Colclough v. Nashville R. R., 2 Head 171; Davidson v. Boston R. R., 3 Cush. 91; Lister v. Loble, 6 Nev. & Man. 340; Ex parte Winder, L. R. (6 Ch. Div.) 696; Ex parte Edwards, L. R. (12 Eq.) 389; Deere v. Guest, 1 Myl. & Cr. 516; Mills on Em. Dom. § 68).*

V. Husband and wife (*Covert v. Hulick, 4 Vr. 307; Sharples v. West Chester, 1 Grant 257; Ross v. North Providence, 10 R. I. 461; Pickert v. Ridgefield Park R. R., 10 C. E. Gr. 316; Ball v. Balfe, 41 Ind. 221; New Orleans v. Wire, 20 La. Ann. 500; Wilkin v. St. Paul R. R., 22 Minn. 177; Mills on Em. Dom. § 71).*

VI. A tenant at will and a subsequent purchaser of the reversion (*Carnochan v. Norwich R. R., 26 Beav. 169*).

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are not to be regarded as in any way subject to the mortgage. On this point, it is enough to say that all the damages so given were given with respect to the mortgaged premises, and were awarded for the injury to the property, the considerations of danger and inconvenience before referred to rendering the property less valuable, and hence the award of damages therefor. Nor is the position tenable that the fact that the award was made to Mr. and Mrs. Bright, is conclusive as to their right to the money and decisive against the claim of the complainant thereto. The railroad company has not only taken a part of the mortgaged premises by condemnation, but it has entered into possession of it and made a deep excavation for the bed of its railroad, doing great injury to the property. The mortgagors have acquiesced in the action of the court as to the money awarded with respect to the mortgaged premises, and the effect of that acquiescence has been that the complainant took no steps against the railroad company to prevent it from injuring the premises, but acquiesced in the occupation of the premises by the company and the adaptation of the property to its purposes. It is true, as against the company, the right of the complainant as mortgagee is unaffected by the proceedings in condemnation, for he was not a party to them. *State, National Railway Co. v. Easton & Amboy R. R.*

VII. Executors and devisees or heirs (*Combs v. Blauvelt*, 4 Vr. 36; *Todemier v. Aspinwall*, 43 Ill. 401; *Martin v. Cullen*, 3 Stew 427, note; *Buckner v. Savannah R. R.*, 7 Rich. (N. S.) 325; *Central R. R. v. Merkel*, 32 Tex. 723; *Mills on Em. Dom.* § 67).

VIII. Vendors and vendees (*Davis v. East Tenn. R. R.*, 1 Sneed 94; *Com. v. Shepard*, 3 Pa. 509; *Stewart v. Raymond*, 7 Sm. & Marsh. 568; *Mims v. Macon R. R.*, 3 Kelly 333; *Curran v. Shattuck*, 24 Cal. 427; *Cornwell v. Springfield &c. R. R.*, 81 Ill. 232; *Lewis v. Wilmington R. R.*, 11 Rich. 91; *Rand v. Townshend*, 26 Vt. 670; *Des Moines v. Cassaday*, 21 Iowa 571; *Dreake v. Beasley*, 26 Ohio St 315; *Meginnis v. Nunamaker*, 64 Pa. St. 374; *Elizabethtown R. R. v. Helm*, 8 Bush 681; *Mills on Em. Dom.* § 66).

IX. The owner of an easement and that of the fee (*Hough v. Doylestown*, 4 Brews. 333; *Barclay R. R. v. Ingham*, 36 Pa. St. 194; *Galena R. R. v. Haslam*, 73 Ill. 494; *Thicknesse v. Lancaster Co.*, 4 M. & W. 471; *Rhines v. Clark*, 51 Pa. St. 96).

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Co., 7 Vr. 182. And in proceedings to condemn, as against the complainant as mortgagee, the company would be required to pay only the value of the property as it was when it took possession. *North Hudson Co. R. R. Co. v. Booraem*, 1 Stew. 450.

But though such are the relations of the complainant and the railroad company at law, it is very clear that the latter, having paid the full value of the land and damages without deduction for or regard to encumbrances, has, under the circumstances, the right in equity to protection as against the lien of the mortgage. It is clearly proved that the award was for the whole value of the land and damages. It is undeniable that it would be highly inequitable to direct the payment of the whole award to Mr. and Mrs. Bright, and subject the company to the liability to pay the mortgage or any part of it. The effect of making the complainant a party to the condemnation proceedings would have been merely to bind him thereby and transfer to the company his interest as mortgagee. The award would still have been to the owner, and the complainant must have had recourse to this court to secure his interest therein, if it had not been conceded. *McIntyre v. Easton & Amboy R. R. Co.*, 11 C. E. Gr. 425. Although the award did not (because he was not a party to the proceedings) prohibit him from enforcing the lien of his mortgage on the land, as against the company, he was at liberty to deal with

X. The owner of mines and that of the surface (*People v. Eldredge*, 3 Hun 541; *Evans v. Haefner*, 29 Mo. 141; *West Covington v. Freking*, 8 Bush 121).

XI. A party with a doubtful or contingent title (*Cator v. Croydon Co.*, 4 Y. & C. 405).

XII. Legatees whose legacies are charged on the lands taken and the devisee (*Reese v. Addams*, 16 Serg. & R. 40).

XIII. Judgment creditors with liens thereon (*Watson v. N. Y. Central R. R.*, 47 N. Y. 157; *Chicago R. R. v. Chamberlain*, 84 Ill. 333; *Gimbel v. Solte*, 59 Ind. 446).

No agreement or combination of the owners of different interests in lands condemned, can increase or affect the value of their aggregate interests. *Burt v. Merchants Ins. Co.*, 115 Mass. 1.—REP.

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the award as a conversion of part of the mortgaged premises into money, and enforce his lien thereon. Equity required him to take that course, under the circumstances. He was under no hard necessity to have recourse to the company, directly or indirectly. The fact that his interest was not, as between him and the company, affected by the condemnation proceedings, and that the award was to the mortgagors, did not bar him from recourse for satisfaction of his mortgage to the money, though, by the award, it was payable to the mortgagors. As before stated, it appears clearly that the award was for the whole value of the land taken and damages to the rest of the mortgaged premises. Where the mortgaged premises are converted into money, the rights of the mortgagee remain unaltered and he is entitled to the money as an equivalent for the land. *Belchier v. Butler*, 1 Eden 523; *Bank of Auburn v. Roberts*, 44 N. Y. 192; *Brown v. Stewart*, 1 Md. Ch. 87; *Astor v. Hoyt*, 5 Wend. 603; *Astor v. Miller*, 2 Paige 68; *Jones on Mort.* § 708; *Schoykill Nav. Co. v. Thoburn*, 7 S. & R. 411; *Reese v. Addams*, 16 Id. 40; *Matter of Noble St.*, 1 Ashm. 276; *John and Cherry Sts.*, 19 Wend. 659. In *Wheeler v. Kirkland*, 12 C. E. Gr. 535, where land was taken by condemnation and the award was to the husband, equity decreed compensation for the wife's inchoate dower out of it. In *Bank of Auburn v. Roberts*, *ubi supra*, money awarded by the state as compensation to the owners of land for damages (depreciation in the value of mill property occasioned by the abandonment of a canal), was held to be subject to the lien of a prior mortgage upon the land to an extent sufficient to satisfy any deficiency upon foreclosure and sale of the premises.

The act of 1877, "respecting the awards of commissioners in cases of lands and real estate taken or condemned by law, and appeals therefrom" (*Rcr. p. 1278*), provides that whenever it shall appear to the chancellor that the lands taken pursuant to any law of this state, or act of incorporation, are encumbered by any mortgage, judgment or other lien of any kind, the money awarded to the owner or

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owners of such lands may, by order of the chancellor, be paid into the court of chancery, and shall be there distributed according to law. The counsel of the mortgagors insist that, inasmuch as the award was made and the money paid into court before the passage of that act, the act can not be applied to this case, and it is argued that the award is in the nature of a contract, and that the application of the act will contravene the constitutional prohibition against legislation impairing the obligation of a contract or depriving a party of any remedy for enforcing a contract which existed when the contract was made. It is quite obvious, however, that the award is not a contract or in the nature of a contract. A contract, as defined by Chief Justice Marshall, in *Sturgis v. Crowninshield*, 4 Wheat. 197, is "an agreement in which a party undertakes to do, or not to do, a particular thing." The obligation to pay an award does not rest on contract, but on necessity imposed by the legislature and arising from constitutional prohibition. The payment or tender of the amount of the award is the performance of a condition precedent, not the execution of a contract.

The act of 1877 provides for the distribution of money awarded on condemnation, among those who are justly entitled to it. Legislation authorizing such action, to a certain extent, existed when that act was passed, and had existed for nearly twenty years. (*Rev. p. 897 § 312.*) But the power to make such distribution is not derived from the statute alone. It arises, independently of it, from the necessities of the administration of justice, and is inherent in this court. The necessity for the action of a court to adjust the claims of parties interested in the money awarded on condemnation, was shown in *McIntyre v. Easton & Amboy R. R. Co.*, 11 C. E. Gr. 425, (1875). The provisions for condemnation in the charter of the Easton and Amboy Railroad Company are similar to those in the charter of the New Egypt and Farmingdale Railroad Company. The latter charter, like the former, gives to the owner or owners the right to recover the amount of the valuation; gives to

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the company and the "owner or owners of the land," alone, the right of appeal, and makes no provision for the assessment of the damages of persons who may have merely an equitable estate in, or lien on, the property condemned. On the subject of the necessity of recourse by the owners of equitable estates, or the holders of equitable claims or liens on the property, to a court for distribution, it was said, in the case just referred to, that a construction of the charter which would require the assessment of the damages of such persons, would necessitate the adjudication by the commissioners on the validity and extent of such estates, interests or liens—adjudications which they, obviously, would, oftentimes, at least, not be competent to make, and which, if made by them, would be likely to embarrass the award with questions which a court of equity alone could decide. It was declared that no such duty is required of them, and that their province is to estimate the value of the land and the damages, and that all claims of equitable estates, interests or liens in or on the land are to be left to be disposed of by agreement of the parties, or by the appropriate tribunal. And, as was intimated in the former opinion in this case, in view of the fact that the condemnation money is in this court, appropriate relief, under the act of 1877 itself, will be extended to the railroad company in the premises.

The company is now a party to this suit, by reason of the condemnation proceedings, which took place *pendente lite*. It has an undoubted equity to have all the rest of the mortgaged premises sold, for the payment of the complainant's mortgage, before recourse is had to the part taken by it by condemnation. It has, also, the superior right to have the condemnation money applied to the payment of the mortgage debt, in exoneration of the land taken by condemnation.

The claim made by Mr. and Mrs. Bright is placed wholly on merely legal grounds. The argument is, that, because the award is to them, therefore the money is to be paid to them, at all events, and in utter disregard of any claim

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under the mortgage. To the suggestion that the mortgagee has an equitable lien on the money arising from the condemnation, it is replied that the mortgagee's lien upon the land condemned is not affected by the proceedings of condemnation, and that, therefore, Mr. and Mrs. Bright are to have the award, the full value of the land taken and damages, and the company is to protect itself as best it may against the mortgage. Such a position cannot be supported in a court of conscience. It is impossible to perceive how they can be injured by applying the money, if their absolute right to it be admitted, to the payment of their debt. The railroad company has never agreed to indemnify them against the mortgage debt, or any part of it. They ask, substantially, that the money received from the condemnation of part of the mortgaged premises shall be paid over to them, notwithstanding and in utter disregard of any claim of the mortgagee thereon under the mortgage, and that he be compelled to have recourse to the rest of the premises for the payment of his debt, and, if that be insufficient for the purpose, then to the land condemned. The mere statement of the proposition demonstrates its inequitable character and its inadmissibility.

There will be a decree that the money in court be applied to the payment of the complainant's mortgage, and that the mortgaged premises be sold to pay the deficiency, subject to the right of the railroad company.

THE AMERICAN TRUST COMPANY OF NEW JERSEY

v.

THE NORTH BELLEVILLE QUARRY COMPANY and others.

After a decree in foreclosure and execution issued against an insolvent corporation, it quarried certain stone on the premises covered by the mortgage, which stone still remained on the ground.—*Held*, that,

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as between the mortgagor and mortgagee, such stone was subject to the mortgage.—*Held*, also, that, under the circumstances, it was subject to the prior lien, under the statute, of the quarrymen's wages.

Bill to foreclose. Petition of the receiver (in insolvency) of the complainants for an injunction to restrain the defendants (the quarry company) from removing or disposing of stone quarried on the mortgaged premises by them since the decree was made and execution issued in the cause. On motion to dissolve the injunction on petition and affidavit annexed, and affidavits on the behalf of the quarry company.

Mr. W. S. Whitehead, for the motion.

Mr. Cortlandt Parker, *contra*.

THE CHANCELLOR.

The mortgagors move to dissolve the injunction, on the ground that the stone which, by the writ, they are restrained from removing or disposing of, has been separated from the quarry, and is, therefore, free from the lien of the mortgage. They also urge that about sixty per cent. of its present value has been given to it by the labor bestowed upon it by their employes.

The decree for sale of the mortgaged premises was made and the execution issued thereon, in 1875. The premises then were, as they ever since have been, in the possession of the mortgagors. They are an insufficient security for the mortgage debt, and the mortgagors are insolvent. The stone which the petitioner seeks to hold by means of the injunction, was quarried from the premises, by the mortgagors, after the execution was issued, and lies on the property. It has not been sold or pledged.

The lien of the petitioner is, under the circumstances valid as between him and the mortgagors. The decree ordered that the premises be sold to pay the mortgage debt

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and the sheriff was directed to sell them accordingly. The mortgagees stayed the execution of the decree, and left the property in the possession of the mortgagors. The latter, with a view to selling the stone, which was part of the realty, quarried it. The fact that they so removed it and expended labor on it, would not, as between them and the mortgagees, divest the lien of the mortgage or put the stone beyond the reach of the decree and execution. It does not appear that any third party has any claim on the stone superior to that of the petitioner, except the workmen of the mortgagors, who may claim a lien for wages under the sixty-third section of the act concerning corporations. That lien would, under the circumstances, be paramount. The mortgagors are, in fact, an insolvent corporation, and proceedings have been taken in this court, in view of their insolvency, for the appointment of a receiver on the application of their workmen. Those proceedings are in abeyance only to afford the mortgagors an opportunity to pay the workmen. The mortgagees have permitted the mortgagors to deal with the mortgaged premises as if they were their own, notwithstanding the decree and execution. Their lien must, as to the stone in question, be postponed to that of the workmen.

The injunction will be modified so as to permit the mortgagors to sell so much of the stone as may be necessary to pay the wages of the workmen.

HANNAH M. WILSON, executrix &c.,

v.

MARY ANN COBB and others, executors &c.

Where an account extending over a number of years was ordered, and the rate of interest during that time had been changed by law,—*Held*, that the interest payable on the accounting must conform to such fluctuations.

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Question of rate of interest

Mr. A. Q. Keasbey, for complainant.*Mr. T. N. McCarter*, for defendants.

THE CHANCELLOR.

By the judgment of the court of errors and appeals (2 *Stew.* 361), the defendants are to be required to account for half of the proceeds of the sale (subject to a certain deduction) of certain railroad bonds, with interest from June 21st, 1864, and the question is as to the rate of interest.

NOTE.—Generally, equity follows the law in allowing or refusing interest. *Heydle v. Hazlehurst*, 4 *Bibb* 19; *McMillen v. Scott*, 1 *Mon.* 1; *Crocker v. Clements*, 23 *Ala.* 296; *Hughes v. Standeford*, 3 *Dana* 286; *Wright v. Jelf*, 3 *Dana* 181; *Hunt v. Smith*, 3 *Rich. Eq.* 465; *Chambers v. Wright*, 52 *Ala.* 444; *Pujoi v. McKinley*, 42 *Cal.* 559; *Becson v. Elliott*, 1 *Del.* 368; *Hammond v. Hammond*, 2 *Bland* 370; *Coatsworth v. Barr*, 11 *Mich.* —

Bearing in mind that, where there is no contract, interest is always regulated by the *lex fori* (*Goddard v. Foster*, 17 *Wall.* 123), the following cases show under what circumstances interest fluctuates with statutory changes enacted after the time when the right thereto had originated or accrued:

In *Walker v. Penry*, 2 *Vern.* 42, interest on a mortgage made in 1660 was payable at the legal rate of eight per cent. By an act of 1660 the rate was reduced to six. The mortgagee entered in 1675.—*Held*, that the extra two per cent. paid between 1660 and 1675 could not be allowed as payments on account of the principal, but the mortgage was entitled to only six per cent. from the date of his entry. See, however, *S. C.*, 2 *Vern.* 145; *Hedworth v. Primate*, *Hardres* 318; *Bodley v. Bellamy*, 1 *W. Bl.* 268; *N. Y. Life Ins. Co. v. Manning*, 3 *Sandf. C.* 58; *Samyn v. Phillips*, 15 *Ohio St.* 218; *Mueller v. McGregor*, 28 *Oh. St.* 265.

In *Proctor v. Cooper*, *Prec. in Ch.* 116, on a bill to redeem a mortgage made in 1641,—*Held*, that complainant must pay eight per cent. until 1660, and after that six.

In *Miller v. Burroughs*, 4 *Johns. Ch.* 436, on a mortgage drawing six per cent., default was made in paying interest after the rate had been raised to seven.—*Held*, on foreclosure, that the interest, up to the time of entering the decree, must be calculated at six per cent. Also *Aldrich v. Sharp*, 4 *Scam.* 261; *Wernwag v. Brown*, 3 *Blackf.* 457; *Wills v. Marsh*, 2 *Beas.* 289; *Whitcher v. Webb*, 44 *Cal.* 127; *Van Beuren v. Van Gaasbeck*, 4 *Cow.* 496; *Wiswell v. Baxter*, 20 *Wis.* 680; *Morgan v. Evans*, *Cl. & Fin.* 160; *Gordon v. Phelps*, 7 *J. J. Marsh.* 619. But see *Bullock Boyd*, *Hoffm.* 294; *Cromwell v. County of Sac.* 96 *U. S.* 51.

In *Astley v. Powis*, 1 *Ves.* 483, on a decree rendered in 1694, it was held that the subsequent arrears of interest, although on articles dra

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est. The judgment was pronounced in March term, 1878. The lawful rate of interest then was seven per cent. per annum, but it was changed to six by a law which took effect on the 4th of July following. A contract for the payment of money made before the 4th of July, 1878, on which interest at the rate of seven per cent. per annum was lawfully payable by its terms, would still bear interest at that rate until the money be paid, or until judgment or decree, notwithstanding the change in the lawful rate, and even though the contract matured before the change took effect. A judgment or decree entered upon it since that change would, however, bear interest only at the legal rate, six per cent. *Wilson v. Marsh*, 2 Beas. 289; *Verree v. Hughes*, 6 Hal. 89;

ing six per cent., should be according to the legal rate at that time—five per cent.

In *Hawkins v. Ridenhour*, 13 Mo. 125, a note bearing ten per cent. interest was made in 1839. In a suit thereon in 1849,—*Held*, that a statute of 1846, providing that no more than six per cent. could be added to any judgment thereafter recovered, applied.

In *Eastin v. Vandorn*, Walk. (Miss.) 214, a statute of 1822, increasing the rate of interest from six to eight per cent., was deemed not to apply to a judgment recovered in 1806. See *Taylor v. Knox*, 5 Dana 466.

In *White v. Lyons*, 42 Cal. 279, an attorney as such received certain moneys of the plaintiff and converted them to his own use in 1863, when the rate was ten per cent. By an act of 1868 the rate was reduced to seven. On a judgment recovered in 1871.—*Held*, that plaintiff was entitled to interest on the amount so converted, at the rate of ten per cent. until 1868, and after that time at the rate of seven. Also, *Randolph v. Bayne*, 44 Cal. 366; *Rootes v. Stone*, 2 Leigh 650.

In *Stark v. Olney*, 3 Oreg. 88, defendant conveyed lands in February, 1854, to plaintiff with full covenants of warranty. Plaintiff was evicted in 1863. In May, 1854, the rate of interest was changed from six to ten per cent.—*Held*, that the proper measure of damages was to compute interest at six per cent. up to May, 1854, and at ten per cent. thenceforward.

In *Klingensmith v. Reed*, 31 Ind. 389, a note was given in 1866, when the rate was six per cent., stipulating for the payment of ten per cent. Afterwards the latter rate was established by a general statute.—*Held*, that the payee could recover ten per cent.

In *Macon v. Trustees &c.*, 7 Ga. 204, a judgment drawing seven per cent. interest, the legal rate at the time of its recovery, was held not to draw eight per cent., the rate established at the time of its revival by *scire facias*. See *Mower v. Kipp*, 6 Paige 88; *Mann v. Taylor*, 1 McCord 171; *Allen v. Adams*, 15 Vt. 16; *Fries v. Watson*, 5 S. & R. 220; *Lewes v. Morgan*, 3 Y. & J. 394.

In *Aguirre v. Packard*, 14 Cal. 171, on a suit against an administrator for goods sold his intestate, the last item being dated September 12th,

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Cox v. Marlatt, 7 Vr. 389. Where interest is given by way of damages for the detention of a debt, it will be allowed according to the legal rate for the time being; and if there have been changes, it will vary from time to time during the period for which interest is allowed, according to the changes. *Matter of Marcy's Account*, 9 C. E. Gr. 451. In this case, then, interest will be allowed at six per cent. from June 21st, 1864, to March 15th, 1866, at which date the legal rate, which, before that, was six per cent., became seven (P. L. 1866 p. 406); and at seven, from that time to July 4th, 1878, and at six thereafter. The decree will bear interest at six per cent.

1848, and the claim presented July 24th, 1858.—*Held*, that an allowance of interest at six per cent. for a year and a half, and at ten per cent. (the new rate) thereafter, was erroneous.

In *Dougherty v. Henarie*, 47 Cal. 9, interest was allowed on a street assessment made after the passage of the act of 1868, allowing interest in such cases, notwithstanding the contract for the work had been awarded prior to 1868.

In *Bailey v. New York*, 7 Hill 146, a statute passed in 1844, giving interest on verdicts, was held not to include those theretofore recovered. Also, *Cooper v. North*, 1 How. Pr. 59; *Bull v. Ketchum*, 2 Den. 12.

In *Lillard v. Field*, 1 J. J. Marsh. 275, a statute of 1798 declared that all usurious contracts should be void. By the act of 1819 only the alleged excess was made void.—*Held*, in an action on a note given in 1825, that it constituted no defence that such note was given to consummate an usurious parol agreement made in 1818, because since 1818 an usurious note given before that time might be enforced for principal and legal interest.

In *Lowell v. Johnson*, 14 Mc. 240, the latter clause of a section, that usury be taken on "any bond &c., made for the payment of money lent," was held to be so far qualified by the first clause of the same section, "if * * * upon any contract hereafter made &c." that a note made before such act went into effect would not be included.

In *Sory v. Kimbrough*, 33 Ga. 21, the defendant, in February, 1845, borrowed of the plaintiff \$12,000 on his note, due in December, 1845, with interest from date, and gave him also another note due at the same time, for twelve and a half per cent. usury. At maturity these notes were renewed, or rather, continued, for one year. By an act of 1845, in force when the loan was originally made, the whole of the interest reserved was forfeited. By the act of 1856 (approved March 31, 1856), only the usurious excess on contracts thereafter made was void.—*Held*, that the renewals constituted a new contract, which must be governed by the act of 1856. See *Meeker v. Hill*, 23 Conn. 57.

In *Mathias v. Cook*, 31 Ill. 83, by an act of 1849, the legal rate of interest on money loaned was ten per cent. By an act of 1857 parti-

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were allowed to stipulate for any rate not exceeding ten per cent., and all prior usury laws were repealed. In a suit on a note given in 1856, reserving above ten per cent.,—*Held*, that such suit must be controlled by the act of 1849.

In *Rathburn v. Wheeler*, 29 Ind. 601, a note, usurious on its face, was given in 1861, and afterwards usurious payments made thereon in 1865 and 1866. Suit was brought thereon after the act of 1867 had gone into operation.—*Held*, that the usury paid in 1865 and 1866 might be inquired into, and if it exceeded ten per cent. (the maximum rate fixed by the act of 1867) the excess might be recouped, notwithstanding an act of 1865 which forbade the recovery of usury voluntarily paid. See *Redman v. Deputy*, 26 Ind. 338; *Bowen v. Phillips*, 55 Ind. 226.

In *McDowell v. Maulsby*, Phill. Eq. 16, a bill of discovery was filed in equity to aid a plea of usury in a suit at law. The defendant demurred to the bill because the discovery would expose him to a forfeiture of the bond which secured the alleged usury, and also to a penalty of double the amount loaned.—*Held*, that the demurrer was good, notwithstanding the enactment of a statute (pending the bill), which took away both the forfeiture and the penalty.

In *Mitchell v. Doggett*, 1 Fla. 356, a note was given in 1839, reserving usury. By the act of 1833, then in force, all usury was void and the giver forever exonerated from paying it. By an act of 1844 that part of the act of 1833 was repealed. In a suit on the note brought in 1846,—*Held*, that the repealer of 1844 did not estop the maker of the note to set up the usury.

In *Root v. Pinney*, 11 Wis. 84, at the time an usurious mortgage was given, it was, by statute, valid for the amount of the principal loaned; and also for the usury reserved, unless the defendant, when sued, tendered the principal. Afterwards the act, so far as such tender was concerned, was repealed, and in a suit thereon defendant set up usury without a tender.—*Held*, that the plaintiff could only recover the principal, since, by the repeal, the defendant was exempted from averring or proving a tender.

In *Mann's Case*, 1 McCord 589, a verdict was obtained in 1810 for a certain sum, with interest from 1808, but no judgment thereon was actually entered. In 1815 an act was passed allowing interest on all judgments for debts that bore interest. In 1820, on motion to enter judgment *nunc pro tunc*,—*Held*, that only the interest from 1808 to 1810 could be added to the execution. See *Clemens v. Judson*, Minor 395.

In *Coles v. Kelsey*, 13 Tex. 75, a statute giving eight per cent. interest on all judgments, was held to include a contract bearing five per cent., and made before the act was passed. See *Pauska v. Daus*, 31 Tex. 67; *McCormick v. Bush*, 47 Tex. 191.

In *Lewis v. Arnold*, 13 Gratt. 454, a statute authorizing a jury to add interest to any verdict thereafter rendered, was construed to include a verdict in an action of tort then depending. See *Hepburn v. Dundas*, 13 Gratt. 219.

In *Wills v. Dunn*, 5 Gratt. 384, a bill was filed in 1819 against an administrator for an accounting between the years 1785 and 1801. In May, 1797, a statute was passed, increasing the rate of interest from five to six per cent.—*Held*, that an allowance of six per cent. from 1785 to the time of entering the decree, was erroneous.

In *Fosdick v. Van Huse*, 21 Mich. 567, a tender of more than was due on a mortgage was made and refused, and the mortgagor filed a bill to redeem.—*Held*, that the mortgagee could not be permitted to com-

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pound the interest thereon, claiming his right to do so under passed after the bill to redeem had been filed.

In *Jenness v. Cutler*, 12 Kan. 500, an usurious note was given when, by statute, all the usury reserved was, in a suit on it forfeited. That statute was afterwards repealed and another allowing twelve per cent. to be collected on such notes.—*Held*, on the note, that the prior statute must govern. See *Seegur* 19 Ill. 121.

In *Newton v. Wilson*, 31 Ark. 484, the constitution provided a law limiting the rate of interest for which an individual may in this state shall ever be passed."—*Held*, that a note, with interest two and a half per cent. a month, made while this was in force, was not affected by subsequent constitutional and statutory repealing such provision.

In *Hubbard v. Callahan*, 42 Conn. 524, an act of 1872 provided where there was no agreement for a different rate, the interest should be six per cent., but that it should be lawful to contract for a higher rate of interest. In September, 1872, the plaintiff loaned the defendant five hundred dollars, and took his note, payable one year after maturity, "with interest at the rate of fifteen per cent. after maturity." When the note became due the act of 1873 was passed, providing that no greater rate of interest than seven per cent. per annum should be recovered or allowed for the time after the money loaned became due."—*Held*, that the fifteen per cent. was to be regarded as interest and not as damages or a penalty; and that if the act of 1873 was intended to apply to such contracts, it was unconstitutional and void. See *Saunders v. Carroll*, 12 La. Ann. 793.

In *Troxwell v. Fugate*, Hurd. (Ky.) 2, a statute of 1799, authorizing the clerk of the court to calculate and add interest on verdicts, was held not to apply to a verdict on a bill given in 1798. Also, *Shepherd*, Id. 44.

In *Avery v. Bowman*, 49 N. H. 453, a statute which authorized the collection of interest on executions, and went into effect March 1, 1843, was held to apply to an execution issued February 27th, 1843.

In *Scott v. Trent*, 4 Hen. & Munf. 356, an act authorizing the courts to award ten per cent. damages, in satisfaction of all costs and damages from the time of rendering the decree below, passed January 1, 1804, was held not to include a decree rendered in 1803. Also, *Beatty v. Smith*, 2 Hen. & Munf. 395.

In *Hazen v. Union Bank*, 1 Sneed 115, a grant in a charter passed in 1835, allowing a bank to receive seven per cent., was not affected by a constitutional provision adopted in 1834, authorizing the legislature to fix a uniform rate throughout the state, and a law passed in 1835 establishing six per cent. as such rate. *Aliter*, as to such a charter subsequently granted. *McKinney v. Memphis Co.*, 12 Heisk. 104. *Bandel v. Isaac*, 13 Md. 202; *Dill v. Ellicott*, Taney C. C. 233.

In *Gwynn v. Turnipseed*, 1 Rich. (N. S.) 80, a statute, providing that interest at seven per cent. should be allowed on all open accounts existing, interest on such accounts not being then allowed in North Carolina,—*Held*, to be unconstitutional.

In *Myers v. Park*, 8 Heisk. 550, a statute enacted in 1875, providing for interest on delinquent taxpayers for taxes assessed in 1874, was held valid. See *Bartruff v. Reney*, 15 Iowa 257; *Ryan v. State*, 5 Nel.

In *Roberts v. Cocks*, 28 Gratt. 207, an act empowering jurors to award interest on claims contracted during the Rebellion, was held

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unconstitutional. See, also, *Cecil v. Deyerle*, *Id.* 775; *Kent v. Kent*, *Id.* 840.

In *Seary v. Moors*, 103 *Mass.* 317, by a statute of 1867, all usury laws were repealed; providing, however, that such act should not affect any existing contract, or action pending, or existing right of action. Under a contract made in 1866, a debtor paid usurious interest in 1868.—*Held*, that he could not recover three-fold the sum paid, although he might have done so prior to 1867, by virtue of the usury laws then in force, and notwithstanding the saving clause in the act of 1867. See *De Merville v. Le Blanc*, 12 *La. Ann.* 221.

In *Mechanics Sav. Bank v. Allen*, 28 *Conn.* 97, an act validating certain previous loans, partly usurious, was held to be constitutional.

In *Andrews v. Russell*, 7 *Blackf.* 474, an act declaring that usurious contracts should not be void, was, on the ground of relieving from a penalty, construed to embrace those made before as well as after its passage. See, also, *Cooley's Const. Lim.* (4th ed.) *376; *Justice v. Charles*, 1 *Ind.* 32; *Reed v. Coale*, 4 *Ind.* 283; *White Water Co. v. Vallette*, 21 *How.* 414; *Baughner v. Nelson*, 9 *Gill* 299; *Perrin v. Lyman*, 32 *Ind.* 16; *Thomas v. Watson*, *Taney C. C.* 297; *Shockley v. Shockley*, 20 *Ind.* 108.

In *Farr v. Chandler*, 51 *N. H.* 545, a general revision of the statutes of New Hampshire changed the usury laws, by repealing the act allowing a recovery of three times the illegal interest paid, with a general saving clause, however, that no repeal should affect any act done or any right accruing or accrued, &c., before the time when such repeal took effect, was held not to deprive a borrower of the right to such deduction on a note made before the repealer went into effect.

In *Williar v. Baltimore Ass'n*, 45 *Md.* 546, an act was passed in 1876, providing that usury should not be set up in any case where the obligation &c. had been redeemed or settled by the parties. An usurious mortgage was settled in September, 1875, and in October, 1875, the obligor brought suit under the then existing law, to recover the usurious excess. The act of 1876, *supra*, was approved while the suit was pending.—*Held*, that the borrower's right of action was vested and could not be suspended or destroyed by the act of 1876.

In *Dunbar v. Wood*, 6 *Vt.* 653, by the act of 1797, merely the usury was avoided and a penalty also given. By an act passed in 1822, containing a general saving clause, the whole instrument was rendered void. A note was given in 1821 and renewed by another in 1824.—*Held*, in an action on the latter, that the law of 1797 must control. See *Folsom v. Blake*, 3 *Edw. Ch.* 442; *Cowry v. Lewis*, 19 *Ind.* 121.

In *Peirson v. Smith*, *Clarke's Ch.* 228, notes were executed and matured in 1836, but were not prosecuted until November, 1837.—*Held*, that the borrower could avail himself of usury under the act of May, 1837, and call upon the plaintiff as a witness to prove the usury. Also, *Post v. Boardman*, *Id.* 523, 530.

In *Howland v. Marr*, 20 *Wis.* 275, the law of 1859 authorized the reservation of twelve per cent., that of 1860 ten per cent.—*Held*, that a note given after 1860 for interest accrued before 1860, and reserving twelve per cent., was valid.

In *Myrick v. Battle*, 5 *Fla.* 345, a note was given March 14th, 1844, payable one day after date. On March 15th, 1844, the rate of interest was reduced from eight to six per cent.—*Held*, that the note bore eight per cent. until the recovery of judgment, and the judgment thereon six per cent.

In *Lee v. Davis*, 1 *A. K. Marsh.* 397, a note was given September 13th,

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1797, payable twelve months after date. When given the rate was five per cent., but before it became due the rate was changed to six per cent.—*Held*, that only five per cent. was recoverable.

In *Bryan v. Moore*, *Minor* 377, a bond was given January 1st, 1817, payable January 1st, 1820. By an act passed in February, 1818, the rate was reduced from eight to six per cent.—*Held*, that until judgment the bond bore eight per cent.

In *Leslie v. Leslie*, *Ll. & G. temp. Sugd.* 1, it was held that a rule of court fixing the rate of interest, applied to a legacy given by a will drawn before the rule was adopted.

In *Henderson v. Laurens*, *2 Desauss.* 170, a legacy was given to a granddaughter, payable to her on attaining twenty-one, or on her marriage, with interest at five per cent.—*Held*, that she was entitled to interest at five per cent., to be calculated until the time when she attained twenty-one, and afterward at seven per cent., the legal rate. See *Galliard ads. Ball*, *1 N. & McC.* 76.

In *Thornton v. Fitzhugh*, *4 Leigh* 209, it was held that, on a bequest of an annuity made in 1791, when the rate was five per cent., although such annuity fall in arrear after the interest was increased to six per cent., such arrear would only carry five per cent.

In *Dunne v. Mastick*, *5 Cal.* 244, a testator died in 1869, at which time interest on legacies was not by statute recoverable. The code of California, allowing interest in such cases, went into effect in 1873.—*Held*, that the legatees could thereunder recover interest on their legacies from the executor, from the time (1872) when he ought to have paid them. See *Dilworth v. Sinderling*, *1 Binn.* 488; *Findley v. Smith*, *7 Serg. & R.* 264.

In *North Bridgewater Bank v. Copeland*, *7 Allen* 139, a statute providing that usury between the payee and maker of a note should not be a defence in an action by an endorsee for value, without notice, was held not to include notes in existence at the time of its enactment. See *Gwynn v. Lee*, *1 Md. Ch.* 445.

In *Hannum v. Bank of Tennessee*, *1 Coldw.* 398, a provision that "no bank shall pay interest or other compensation, in consideration of deposits," was held not to invalidate an agreement to pay interest made before the time of its passage, nor to prevent the subsequent payment of interest on previous deposits, so long as they remained in the bank.

In *Brandon v. Green*, *7 Humph.* 130, an act authorizing a bill to be filed in chancery to obtain relief where a defendant sued at law on an usurious contract failed to plead or prove the usury, was construed to embrace a judgment obtained before its passage. See *Greenfield v. Frierson*, *7 Heisk.* 633; *Campbell v. Morrison*, *7 Paige* 157; *Skinner v. Christmas*, *Clarke's Ch.* 268.

In *Magwood v. Duggan*, *1 Hill (S. C.)* 182, an act of 1777 declaring that all usurious contracts should be utterly void was so far repealed by an act of 1830 as to allow the lender to recover the principal without interest or costs.—*Held*, that a lender could not make such recovery on a note given before 1830. Also, *Morton v. Rutherford*, *18 Wis.* 298; *Springfield Bank v. Merrick*, *14 Mass.* 322; *Nicholls v. Gee*, *30 Ark.* 135; *Pond v. Horner*, *65 N. C.* 84; *Drake v. Latham*, *50 Ill.* 270; *Sparks v. Clapper*, *30 Ind.* 204.

In *Hunter v. Hatch*, *45 Ill.* 178, a statutory provision that all usurious payments should be considered as principal *pro tanto*, was held to be a vested right, and irrepealable by a subsequent statute.

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An agreement between the parties to a contract which is due, to increase the rate of interest from six to seven per cent., the latter being the present legal rate, is valid. *Conover v. Van Mater*, 3 C. E. Gr. 481; *Smith v. Graham*, 34 Mich. 302; *Burchard v. Frazer*, 23 Mich. 224. See *Gardner v. Emerson*, 40 Ill. 296; *Bassett v. McDonel*, 13 Wis. 444.

See, also, an excellent article on the retroactive effect of statutes abolishing usury laws, contained in 8 Cent. L. J. 430, and which had escaped notice until after the preparation of the above note.—REP.

DIME SAVINGS INSTITUTION OF PLAINFIELD

v.

BARNABAS T. MULFORD and others.

Bill to foreclose. Defence, usury.—*Held*, that where the lender is a corporation, and the agent in making the loan is its officer, and it is shown that a premium was paid to the latter for the loan in pursuance of a contract made by him with the borrower in the name of and for the corporation, it must be assumed, in the absence of proof to the contrary, that the premium was paid to and received by the corporation.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. E. W. Runyon, for complainant.

Mr. W. B. Maxson, for defendant.

THE CHANCELLOR.

The defence of usury is set up to the mortgage in suit. It is alleged that the complainants received, in addition to an agreement for lawful interest, a premium of five per cent. on the making of the loan, which was \$5,000. The premium was received by Elias R. Pope, who was the secretary and treasurer of the institution, and, as is admitted, acted for it in making the loan. The payment of the premium was made by the treasurer a condition of the making of the loan. Though he received the premium, it does not

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appear that he received it on his own account; nor, on the other hand, does it appear that it was not received by the institution. All, it is said, of the members of the "board of investment" were sworn, and they all testify that they knew nothing of the taking of the premium. They also say that it was understood that no premium should be taken upon the loans made by the institution. But still it does not appear that the premium paid to Mr. Pope was not, in fact, received by the institution. He was, when the loan was made, a manager, as well as secretary and treasurer of the institution. He is still secretary and treasurer of it and, perhaps, also a manager. He could have told whether the premium was received by the institution or not. He was not called as a witness, however, and no reason is given for not doing so. Indeed, there appears to be none.

In such a case as this, where a premium has been taken on a loan by a corporation, and it is made part of the bargain, by its financial agent acting for it in the matter, that a premium shall be paid for the loan, it should, in order to save the institution from the consequences of the usury law appear, affirmatively, that the premium was not received by itself, but, if received by its agent, was for his own benefit alone. In *Muir v. Newark Savings Institution*, 1 C. E. Gr 537, there was not only no evidence that the treasurer had any authority from the institution to receive the premium or that the other members of the funding committee, by whose concurrence the loan was made, had any knowledge of the transaction, but it was proved that they were ignorant of it, and that no part of the premium went into the funds of the institution. In that case, it may be remarked the treasurer was dead when the suit was brought. On the evidence in this case, I can not say that the premium was received by the treasurer for his own private benefit. In the absence of testimony to the contrary, the presumption is the other way—that he acted for the institution in receiving it.

Harrall's Case.

It is insisted, in the brief of counsel on the part of the complainant, that, in such a case as this, the burden of proof is upon the defendant; that it is incumbent upon him to show not only that a premium was taken, but that it was received by the lender. The position is untenable. Where the lender is a corporation and the agent is its officer, and it is shown that the premium was paid to the latter in pursuance of a contract for the loan made by him, in the name of and for the corporation, in the absence of proof to the contrary, it must be assumed that the premium was paid to and received by the corporation. In this case, it would seem that it would have been extremely easy to show that the premium was not received by the institution if such was, indeed, the fact. The testimony of the managers that they knew nothing of the taking of the premium, and that it was understood that the institution took none on its loans, was manifestly of but little value, compared with the testimony of the official by whom the loan was made, and who knew who received the money. Had he sworn that the premium was not received by the institution, the defence would have failed. In the absence of his testimony, it must be sustained. It may be added, that it would seem that, if the premium was not received by the institution, it would not have been difficult to show it by the books.



In the matter of the estate of FREDERICK J. HARRALL, a lunatic.

The wife of a lunatic who had an ample estate applied for an order requiring his guardian to redeem for her benefit certain separate property of hers (jewels &c.) pawned, with her consent, by her husband while sane, to pay his personal expenses, and the proceeds of the loan were so applied.—*Held*, that she was entitled to relief, and that her husband, under the circumstances, is bound, in equity, to redeem the property.

Harrall's Case.

On petition of the wife of the lunatic for an order directing his guardian to pay to her the money necessary to redeem certain personal property which she claims as having been silver-plate and personal ornaments, pawned by him in Paris, and still remaining in pledge there

Messrs. Linn & Babbett, for the petitioner.

Mr. F. McGee, contra.

THE CHANCELLOR.

It appears, by the testimony, that the property was, without the wife's consent, pledged by her husband, while they were living together in Paris, to raise money. On the ornaments four hundred and seventy-five francs were obtained, and on the plate one hundred and forty. Of the ornaments, part were purchased by the wife, with money given to her by her husband for the purpose, and the rest were bought with her own money, before marriage. The silver plate was bought with the husband's money. The petitioner does not claim that it was presented by him to her. The petitioner's claim to the relief for which she applies rests on the ground that her husband, having pledged her separate property for his own benefit, is bound (his estate being ample) to redeem; and she is right. *Graham v. Londonderry*, 3 Atk. 393; *Vreeland v. Vreeland's adm'r*, 1 C. E. 512. There is no evidence or presumption that the plate was her property, but, under the circumstances, the presumption is that it was the property of her husband. *Bishop's Law of Mar. Wom.* § 228. The money raised to redeem her ornaments was, according to the evidence, applied to her husband's use. Part of it was used to pay a tailor's bill, part to buy clothing for him, and the rest to pay

NOTE.—As to the relative rights of a creditor and husband and wife in the wife's goods pledged by the husband to secure his own debt, see *Robertson v. Wilcox*, 36 Conn. 4; *Van Arsdale v. Joiner*, 44 Ga. 173; *Merrill v. Parker*, 112 Mass. 250.—]

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household expenses. The claim of the petitioner is opposed by the guardian, and is litigated, also, on behalf of the lunatic's brother and sister. He has no parents or children.

The wife is entitled to have the paraphernalia redeemed, but not the plate.

ANNA ALLEN and others.

v.

ELIZABETH H. WOOD and others.

The holder of a second mortgage, payable in three installments, filed his bill to foreclose for the payment of the second installment and interest thereon and costs. The first installment had been satisfied by means of a collateral mortgage. The third installment was not due. The bill alleged that the property was indivisible, and decree was taken for the sale of the whole, to pay the amount of the second installment and interest and costs, as prayed by the bill. A subsequent mortgagee (the third) purchased the decree and took an assignment thereof. The property was not sold under the execution. The third installment becoming due and being unpaid, the complainant filed his bill for foreclosure and sale of the whole premises, to pay it.—*Held*, that the court would direct a sale of the property under the former decree, and apply the surplus, as far as necessary, to the payment of the third installment. The property was to be sold subject to the first mortgage, which was not foreclosed.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. C. T. Reed, for complainants.

Mr. S. H. Grey, for Camden Safe Deposit and Trust Company.

THE CHANCELLOR.

The principal (\$14,400) of the complainants' mortgage, a mortgage of real estate, was payable in three equal install-

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ments of six months, one year and two years from date. The mortgage was given March 20th, 1876. A chattel mortgage was given at the same time as additional security for the payment of the first installment. That mortgage was foreclosed and the decree assigned by the mortgagee to the Camden Safe Deposit and Trust Company, and the amount thereof paid to them. That company then held, as it still does, a third mortgage on the mortgaged land. The complainants' mortgage is the second. When the second installment became due on their mortgage, the complainants filed their bill for foreclosure and sale, to obtain payment of that installment and interest thereon. A decree was made in that suit that the mortgaged premises be sold to raise and pay that installment and interest with costs of suit. The property was not sold under it, however, but the decree was assigned to the Safe Deposit and Trust Company (by which it is still held), for the consideration of the amount due thereon, paid by it therefor.

The complainants' bill is filed for foreclosure and sale of the mortgaged premises, to pay the third installment, with interest and costs. The Safe Deposit and Trust Company claims, in its answer, that the complainants, by the former foreclosure proceedings to raise the second installment, abandoned all claim to the mortgaged premises, and have no lien thereon or on the proceeds of the sale thereof. The decree in the former suit is for the sale of the whole of the mortgaged premises, to pay the second installment, with interest and costs. Had all the property been sold under that decree the lien of the mortgage on the property would, of course, have been gone (*Mott v. Shreve*, 10 C. E. Gr. 438); but for the payment of the third installment and interest it would have insisted upon the surplus, if any, of the proceeds of the sale. By the decree, the surplus is ordered to be paid into court, unless otherwise previously disposed of by the order of the court. When paid into court it would have been available to the complainants for the payment of the third installment. The lien of the mor

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gage for that installment would have been transferred by the conversion of the surplus proceeds. *Platt v. Bright*, 4 Stew. 81. But the premises have not, nor has any part of them, been sold, and the whole of them will not be sold to pay the amount due on the decree for the second installment and interest, unless it proves to be necessary to do so. The court will control the sale so as to protect the interests of all parties so far as practicable. And although the decree directs the sale of the whole of the mortgaged premises, the court may, if the property be divisible, order, after execution issued, that only such parts be sold as may be necessary to pay the amount due on the decree. *Am. L. & F. In. & Tr. Co. v. Ryerson*, 2 Hal. Ch. 9. There is an order made after the execution was issued, designed to effect that object. It directs the sheriff to sell so much of the mortgaged premises as may be necessary to raise the money, in such parcels as may seem to him most for the benefit of the parties to the suit. The whole matter is within the control of the court, and it will direct that the property be sold under the former execution (it is to be sold subject to the first mortgage), and any surplus applied to the decree in this. Under the decree in the former suit, the Safe Deposit and Trust Company has the right to have the money which, by the decree, is directed to be made, raised and paid over to it, and no more.

There will be a decree in accordance with these views.

GEORGE S. COE and others

v.

THE NEW JERSEY MIDLAND RAILWAY COMPANY and others.

1. A foreclosure suit is not a proper proceeding in which to litigate the rights of a party claiming title to the mortgaged premises in hostility to the mortgagor. Therefore, where defendants, who were per-

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mitted to intervene in a foreclosure suit upon a mortgage made by a railroad company formed by the amalgamation or consolidation, pursuant to legislative authority, of certain existing railroad companies sought to question and litigate the validity of the consolidation,—*Held*, that that defence would not be entertained.

2. The supplement (approved February 28th, 1849) to the act concerning corporations (*Nix. Dig. 169, Rev. p. 186*), which provides that all companies incorporated under the laws of this state, whose charters do not designate their places of meeting, shall hold their business meetings, the meetings of their directors, &c., in this state, by its terms does not apply to companies whose charters are not subject, to the terms thereof, to alteration, modification or repeal.

3. A provision in a corporation mortgage that the principal shall become due in case default be made in the payment of interest, is not in contrariety to a resolution authorizing the giving of the mortgage which merely provides that the mortgage shall be given to secure the payment of the principal at a certain time, with interest payable semi-annually.

4. With a view to recording, a corporation mortgage may be proved by the president or secretary, if signed by them, though they signed it by order of the board of directors. They may be regarded as subscribing witnesses within the meaning of the act respecting conveyances (*Rev. p. 152 § 4*). But it cannot be proved by one who did not sign the mortgage. It is not requisite to a compliance with the statute in regard to proof of such instruments, that it should appear that the contents of the instrument were made known to the mortgagor. A record of a mortgage made by transcription from a copy of the mortgage examined by the clerk on production to him of the original, is in conformity with the requirements of the statute.

5. A railroad mortgage made to trustees without words of inheritance, but empowering the trustees, on default, to sell the mortgaged premises and to convey to the purchaser "all the estate, right, property and interest, and to the same extent as the railroad company had therein at the date of the mortgage, &c." will be rectified so as to convey a fee. The court may direct the trustees to convey all their title to the purchaser at the foreclosure sale in aid of the execution.

6. Where an act of the legislature authorizing a railroad corporation to give a mortgage, evidently contemplates a mortgage of all the estate of the company, it will be held, unless the contrary appear, that the mortgage given under the authority was intended to and did convey the estate to the full extent contemplated or authorized by the act.

7. Under a prayer for other or further relief in a bill for foreclosure, the mortgage may be reformed.

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8. A chattel mortgage on the equipment of a railroad, made by authority of the board of directors of an insolvent corporation, for securing the claims of directors against the corporation,—*Held*, to be invalid as against prior mortgagees of the franchises and equipment, whose mortgages were not filed (the transaction was prior to the act of 1876, *Rev. p. 924* § 86), because the directors (they were also stockholders) had notice of the prior mortgages. Such prior mortgages, however,—*Held*, not to be valid against judgment creditors who, but for the receivership obtained in a suit to foreclose one of the mortgages, might have made a lawful, valid levy on the equipment.

9. The recovery of a judgment against a railroad company for the value of land and damages taken by condemnation, is no bar to the enforcement of a vendor's lien for the money.

10. A depot building,—*Held*, as against a mechanics lien, to be property connected with the line of the railroad, and regarded as part of the mortgaged premises which were described by a general description covering the railroad and land, ground, depots, station-houses &c., acquired and to be acquired.

11. The lien given to laborers by the act concerning corporations (*Rev. p. 188* § 63), cannot be extended so as to impair the obligation of contracts or lien of duly recorded encumbrances antecedent to the act.

12. That the trustees under a railroad mortgage which gave them the right to take possession of the mortgaged premises in case of default of payment of interest, did not see fit to take possession after default, but permitted the mortgagors to continue in possession and operate the road, and the fact that the employes of the mortgagor were not aware, when they rendered the service, that default had taken place, gives to the latter no claim against the mortgagees for their wages.

13. The case of *Foadic v. Scholl*, *U. S. Sup. Ct.*, 8 *Cent. L. J.* 298, considered.

14. A railroad company held its rolling stock under an agreement to pay for it in installments, the title not to pass to the company until the whole sum agreed to be paid for it should be paid, and, in case of default, all previous payments to be forfeited. It became insolvent and had no money to pay an installment which became due. Directors of the company, in order to save the rolling stock, advanced the money out of their private funds, on the strength of an agreement made by the other members of the board with them that they should be subrogated to the rights of the vendors for their repayment, but no resolution to that effect was in fact passed by the board.—*Held*, that they were entitled to subrogation, subject to the superior right of the vendors as to the unpaid balance of the price.

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15. A railroad company permitted its charter to be used for purposes of condemnation of lands for another company's road, and on the location of the latter, which paid and took title in its own name for the land, and built the road.—*Held*, that the road was the property of the latter company. If, in such case, any of the land condemned was paid for by the former company with its own funds, which have not been repaid to it, the latter company is bound to refund the amount.

16. A railroad company having located its road, permitted another company to locate its road on the same location and to build its road upon it,—*Held*, that the former thereby relinquished its right to the location.

17. The case of *Randolph v. New Jersey West Line R. R.*, 1 *Stew.* 49, distinguished.

18. By an agreement between two railroad companies, one, in consideration of a right to cross its road, gave the other a right to cross in future.—*Held*, that specific performance of the agreement would not be decreed where the crossing was to be at a place not contemplated by the parties, and where it would do very great damage to the former company—it would cross a drill and freight-yard.

19. That the mortgagees of the premises which it is proposed to cross, might have known of the intention to cross, from the fact of the building of a tunnel, to enter which the crossing was necessary, will not bind them to the consequences of acquiescence. In estimating damages, the value of the crossing, which was the consideration of the agreement, will be allowed.

On final hearing on pleadings and proofs.

Mr. B. Williamson, Mr. Ashbel Green, Mr. W. S. Opdyke of New York, and *Mr. J. W. Taylor*, for complainants.

Mr. T. D. Hoxsey, for stockholders of the New Jersey Western Railroad Company, and for third mortgage bondholders of the New Jersey Midland Railway Company, and Van Houten, Demarest and others, judgment creditors.

Mr. John Linn and *Mr. J. D. Bedle*, for R. P. Terhune, judgment creditor, and for Terhune & Olmstead, trustees in chattel mortgage; also, for Wortendyke, Watkins and others claiming subrogation.

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Mr. R. Wayne Parker, Mr. E. Ellery Anderson of New York, and *Mr. Cortlandt Parker*, for E. Ellery Anderson, trustee.

Mr. R. Wayne Parker and *Mr. C. Parker*, for employes.

Mr. J. Vanatta, for the Delaware, Lackawanna and Western and Morris and Essex Railroad Companies.

Mr. A. W. Cutler, for David D. Hennion and others.

THE CHANCELLOR.

The New Jersey, Hudson and Delaware Railroad Company was incorporated by an act passed March 8th, 1832 (*P. L. 1832, p. 133*); the Sussex Valley Railroad Company by an act approved March 14th, 1867 (*P. L. 1867, p. 215*); the New Jersey Western Railroad Company by an act approved March 21st, 1867 (*P. L. 1867, p. 386*), and the Hoboken, Ridgefield and Paterson Railway Company by an act approved March 15th, 1867 (*P. L. 1867, p. 720*). By an act approved March 17th, 1870, entitled "An act to authorize the consolidation of the capital stock, property, powers, privileges and franchises of the New Jersey, Hudson and Delaware Railroad Company, with those of the New Jersey Western Railroad Company, the Sussex Valley Railroad Company, and the Hoboken, Ridgefield and Paterson Railway Company, or either of them" (*P. L. 1870, p. 811*), provision was made for the consolidation of those corporations under a new one, to be known as the New Jersey Midland Railway Company. By an act approved March 31st, 1871 (*P. L. 1871, p. 1093*), after reciting that the consolidation had been effected under the act of March 17th, 1870, and that the papers relating thereto had been filed in the office of the secretary of state, as required by that act (the certificate was filed on the 13th of July, 1870), it was enacted that the consolidation be, and was thereby validated and confirmed, and that the corporations so consolidated

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were, and were thereby merged and consolidated into, the New Jersey Midland Railway Company. After the consolidation, and in 1870, the New Jersey Midland Railway Company gave to George S. Coe, George Opdyke and Abram S. Hewitt, as trustees, a mortgage, dated August 1st, in that year, to secure its bonds, to the amount of \$3,000,000, with interest. The mortgage conveys the mortgaged premises to the trustees as joint tenants, and not as tenants in common, and to the survivors and survivor of them, and to their successors and successor in the trust and to their assigns; and their premises are described therein as follow:

“All and singular the line of railway known and to be known as the New Jersey Midland Railway as the same is being and shall be constructed, from the state line at or near Unionville, in the state of New York, to the Hudson river, including all the railways, ways, rights of way, depots, ground or other lands, all tracks, bridges, viaducts, culverts, fences and other structures, depots, station-houses, engine-houses, car-houses, freight-houses, wood-houses, water-stations and other buildings, and all machine-shops, and all real or personal property held or acquired, or hereafter to be held or acquired, by the said company, its successors or assigns, for use in connection with the aforesaid railway of the party of the first part (the company), or with any part thereof, or with the business of the same, and including all locomotives, tenders, cars and other rolling stock or equipments, and all machinery, tools, implements, fuel and materials for constructing, operating, repairing or replacing the aforesaid railway, or any part thereof, or of any of the equipments or appurtenances of the aforesaid railway, or any part thereof, and all machinery of all kinds, and all and singular the other personal property of any nature, kind and description whatsoever belonging to the said party of the first part (the mortgagor), wheresoever the same may be situated; all of which personal chattels are hereby declared and agreed to be fixtures and appurtenances of the said railroad, and are to be used and sold therewith, and not separate therefrom, and are to be taken as part thereof, and all tolls, incomes, issues and profits, to be had or derived from the same, or any part or portion thereof, or from any part or portion of said term or terms, or either thereof, and all right to receive and recover the same; and, also, all franchises connected with or relating to the aforesaid railway, or to the construction, maintenance or use of the same, together with all and singular the tenements and appurtenances to the aforesaid railway, lands and premises, or either thereof,

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belonging or in anywise appertaining, and the reversion or reversions, remainder or remainders, tolls, incomes, revenues, rents, issues and profits thereof; and, also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part of, in and to the same, and any and every part thereof, with the appurtenances."

In 1871, the company gave Daniel Haines, as trustee, a mortgage on the same property, by the same description, to secure the payment of \$1,500,000, with interest. That mortgage was expressly declared to be subject to the prior lien created by the above-mentioned first mortgage.

In 1873, the company gave a mortgage (known as the consolidated mortgage), dated April 30th, in that year, for \$10,000,000, with interest, upon the line of railway then known and to be known as The New Jersey Midland Railway, as the same was being and should be constructed from the state line, at or near Unionville, in the state of New York, to the Hudson river, and also an extension of that railway from some point on the main line thereof, westerly of Newfoundland, in the county of Passaic, to the Delaware river, together with the extension and connection from the main line of said railway, east of Ridgefield Park to Weehawken, by a tunnel or open cut, through or over Bergen Hill, and including all the railway, ways, rights of ways, depots &c.; and the franchises connected with or relating to the railway, or the construction, maintenance or uses of the same. By that mortgage it was recited that the mortgage of August, 1870, above mentioned, was a first lien upon certain property of the railway company; that the mortgage above mentioned, of January 2d, 1871, was a second lien upon property of the company; that both of those liens were recognized as liens prior to the mortgage thereby created upon the property mentioned in the first and second mortgages, respectively, and that the amounts secured by those liens was in the aggregate four and a half millions of dollars, with interest thereon at the rate of seven per cent. per annum, payable semi-annually, and that for the purpose

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of enabling the mortgagor to liquidate or satisfy those liabilities and liabilities, as well as for the purpose of obtaining money and materials necessary to perfect, enlarge and extend its line of railway, and to develop and increase terminal and ferry facilities upon the Hudson river, the mortgagor had, by a vote of its directors, resolved to borrow money to an amount not to exceed ten millions of dollars to be secured by that mortgage; and that it was there expressly understood and agreed by and between the parties to the mortgage, that four and a half millions of dollars par value of the bonds secured by that mortgage should be placed in the custody of the trustee under that mortgage, and should so remain in trust, and not be issued or withdrawn except upon the presentation and surrender to, and cancellation by, him or his successor, of an amount of the before-mentioned prior lien bonds and interest equal to the amount of those bonds so to be from time to time withdrawn from the trust; the bonds by the consolidated mortgage secured to be so withdrawn, and the prior lien bonds outstanding, to be cancelled to a corresponding amount until all of the outstanding prior lien bonds and the coupons thereon should mature and be cancelled.

On the 8th of March, 1875, Garret A. Hobart was appointed receiver of the mortgagor on proceedings in insolvency. On the 22d of that month George S. Coe and George Opdyke, trustees, filed their bill to foreclose the first mortgage. On the 30th of March, 1875, James McCulloh and Garret A. Hobart were appointed receivers in the cause of the mortgaged property, and since then they have operated the railway as such receivers. The parties defendant to that suit are Jabez P. Pennington, successor of Daniel Haines, deceased, as trustee under the second mortgage; Abram S. Hewitt, trustee under the third consolidated mortgage; Richard P. Terhune and Samuel Olmstead, trustees under a chattel mortgage given by the New Jersey Midland Railway Company, and dated February 12th, 1875 (it is also dated January 30th, 1875),

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secure the sum of \$88,588.08; the Hudson Connecting Railway Company, as claiming certain premises which the complainants insist are part of the mortgaged premises; E. Ellery Anderson, as mortgagee of the last-named company, under a mortgage dated January 1st, 1872; Oliver Robinson, as claiming under a deed or license in writing purporting to affect a part of the premises mortgaged under the first mortgage; John M. Stevenson and William W. Rand, as claiming under a deed of conveyance from the railway company, bearing date September 8th, 1871, and purporting to affect part of the mortgaged premises; Rand also claims under another like deed, dated August 31st, 1871, also purporting to affect a part of the mortgaged premises; John H. Van Houten and James C. Demarest, as claiming under a deed of conveyance from the sheriff of Passaic county to them, dated November 7th, 1874, and purporting to affect part of the mortgaged premises, and also as claiming a lien by virtue of a judgment recovered by them against the railway company in the circuit court for the county of Passaic, on or about the 9th of January, 1874, for \$2,799.71; Stephen Strait and others, as claiming liens by reason of sundry judgments recovered by them respectively against the railway company; Cornelius T. Demarest and others, as representing claims of themselves and numerous other employes of the Midland Railway Company, for wages, for which they claim a lien against the income and rolling stock of the company; and the Delaware, Lackawanna and Western Railroad Company, and the Morris and Essex Railroad Company, by reason of a claim and controversy in respect to the right of those companies to cross the railroad operated by the Midland Company near the mouth of the tunnel of the former company.

Thomas D. Hoxsey was allowed to intervene as a defendant, as assignee of a judgment against the mortgagor, and also as owner of stock of the New Jersey Western Railroad Company, and of \$80,000 of the third or consolidated mortgage bonds, and as owner of \$20,000 of the capital stock of

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the New Jersey Midland Railway Company; and James Jackson was permitted to intervene as a defendant, as owner of stock of that company and as owner of third mortgage bonds. Hezekiah Watkins and others, claiming liens under a claim of subrogation, were also made defendants.

Answers were filed in the cause by the following defendants: Terhune and Olmstead, trustees under the chattel mortgage; Hennion and others, judgment creditors; James Jackson; Garret A. Hobart, receiver, answering on behalf of a committee of bondholders, raising a claim as to the payment of certain interest coupons; Thomas D. Hoxsey, the Morris and Essex, and Delaware, Lackawanna and Western Railroad Companies, Hezekiah Watkins and others, Cornelius T. Demarest, the Hudson Connecting Railway Company, and E. Ellery Anderson, trustee under the mortgage of the last-named company. The other defendants have not answered, and the bill has been taken as confessed as against them. The Morris and Essex, and Delaware, Lackawanna and Western Railroad Companies filed a cross-bill in respect to the claim and controversy before mentioned. To this the complainants in the original suit answered. The Hudson Connecting Railway Company and E. Ellery Anderson, trustee, filed an original bill in the nature of a cross-bill, to which Messrs. Coe and Opdyke, trustees, filed an answer. That bill prays that the complainants therein may, as against the complainants in the original suit and the Midland Company and its other mortgagees, be decreed to be the owners of all the lands and parcels of land described in the Connecting Company mortgage, the title to which was taken in the name of the Midland Company, and that those lands may be decreed to be absolutely free from the Midland mortgages. The suit for foreclosure of the first mortgage and the cross-suits were all heard together.

Before proceeding to the consideration of the matters legitimately in controversy in the cause, the objections made in respect to the alleged defect in the consolidation

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to which the mortgagor, the New Jersey Midland Railway Company, owes its existence, may be disposed of.

The consolidation is attacked by some of the defendants. They claim that, by reason of various omissions and defects, it is not valid, and that therefore the stockholders of the consolidated companies, or some of them, have rights which should be regarded and protected in this suit.

The consolidation has received the recognition, approval and confirmation of the legislature. By the act of March 1st, 1871, it was validated and confirmed, and it was enacted that the consolidated corporations be, and they were thereby, merged and consolidated into The New Jersey Midland Railway Company. It was also declared, by way of recital, that under and by virtue and in pursuance of the act of March 17th, 1870, the consolidated companies had effected the consolidation, and had filed the papers in the proper office, as required by the act. By subsequent acts (March 26th, 1872, March 27th, 1872, and February 19th, 1873), the existence of The New Jersey Midland Railway Company, as a corporation, was recognized by the legislature. It is enough, however, to say that, in this suit, a mere proceeding *in rem*, brought by encumbrancers of the consolidated company against it upon encumbrances created by it, the question raised as to the validity of the consolidation has no place. Any rights which stockholders in the consolidated corporations may have, will not be unjustly affected by these proceedings to which they are not a party. The defence set up on this head by the defendant, who has intervened in respect of his ownership of stock of the New Jersey Western Railroad Company, as well as of third or consolidated mortgage bonds of the consolidated company, questions the legality of the existence of the mortgagor and its right to mortgage the property of which it claims to be the owner, on the ground that the interests of some of the stockholders of the consolidated companies, as such, have not been acquired by it nor lost by them, but

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still exist and give them a paramount claim to the property and franchises of their respective companies.

A foreclosure suit is not a proper proceeding in which to litigate the rights of a party claiming title to the mortgaged premises in hostility to the mortgagor. *Lewis v. Smith*, 9 N. Y. 502, 514; *Bogey v. Shute*, 4 Jones Eq. 174; *Jones v. St. John*, 4 Sandf. Ch. 208; *Wilkins v. Kirkbride*, 12 C. E. Gr. 93. This suit is not a proper proceeding for the establishment or vindication of their rights. It may be added that it would seem that, from the time when the consolidation (which must have been a matter of public notoriety) took place to the commencement of this suit, none of the stockholders whose adverse claims are now advanced have taken any measures to vindicate their alleged rights in respect of their ownership of stock in the companies consolidated, but have, apparently, acquiesced in the consolidation, and the recognition and declaration of its validity by the legislature, and in the issue and negotiation of bonds to the extent of many millions of dollars, upon the faith of that consolidation, against which they now, as it would seem, for the first time, protest.

In behalf of the second and third mortgagees and certain judgment creditors, the validity of the first mortgage is attacked, on the ground that the resolution authorizing it was passed at a meeting held out of the state (in the city of New York), and was, therefore, illegal and invalid; that the mortgage does not conform to the resolution authorizing it that its execution was not properly acknowledged, and that it was not duly recorded in some of the counties through which the road passes.

To consider the first of these objections, that the resolution was illegal. This is based on the prohibition contained in the supplement, approved February 28th, 1849, to the act concerning corporations (*Nix. Dig. 169, Rev. Corporations § 56*) and the supposed authority of the case of *Hilles v. Parris* 1 McCart. 380. It is to be observed that that supplement while it provides that all companies incorporated under the

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of this state whose charters do not designate their place of meeting, shall hold their business meetings, the meetings of their directors, and shall keep their offices and principal places of business in this state, provides, also, that the act shall not apply to any corporations whose charters are not subject, by the terms thereof, to be altered, modified or repealed. None of the charters of the consolidated companies are subject, in their terms, to alteration, modification or repeal. The legal principle mentioned in *Hilles v. Parrish* is, that a corporation, whose charter has been granted by one state, cannot hold meetings and pass votes in another state; there is a well-settled distinction between corporate acts, or so called, acts of the company itself, as such, and acts of its authorized agents. *Green's Brice's Ultra Vires* 76; *Jones on R. R. Securities* § 84. In *Ang. & Ames* 2d ed. §§ 124, 274, it is said that the directors of a corporation are not a corporate body when acting as a board, and are incompetent to act as agents beyond the bounds where the corporation exists. See, also, *Galveston R. R. v. Cowley*, 1 Wall. 459, and *Arms v. Conant*, 36 Vt. 745.

Again, there is sufficient evidence of ratification of the act of the board of directors in passing the resolution in question, both by their constituents and the legislature, to remove any question as to its validity. The mortgage was executed as a corporate act, under the seal of the company and in the hand of its president; it was recorded in the files through which the railroad passes, and the money raised by the sale of the bonds secured by the mortgage was expended upon the road itself. In the second and third mortgages the existence of the first mortgage is stated, and it is recognized as a prior and a first lien on the property.

The holders of the second and third mortgage bonds have taken their securities expressly subject to its lien, and the third mortgage also makes express provision for the payment, out of the loan thereby secured, of the amount of the first and second mortgages.

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Nor, it may be remarked, in passing, are the rights of judgment creditors superior to those of the second and third mortgage bondholders.

But, further, the legislature, by act of March 27th, 1872 (*P. L. 1872, p. 924*), recognized the legality of the first mortgage. After reciting that the company had provided for the issue of its first mortgage bonds in several denominations (\$100, \$500 and \$1,000) to the amount in the aggregate of three millions, the act authorizes and empowers the company to cancel and destroy five hundred and fifty of those bonds, of the denomination of \$100 each, and to issue instead, an additional series of first mortgage bonds of the denomination of \$1,000; and it provides that the additional series shall consist of fifty-five of those bonds, which shall be countersigned by the trustees, and thereupon shall be held and deemed, in all courts and places whatsoever, to be secured by that mortgage, the same as if they had originally been subject to the lien thereof.

The objection that the mortgage does not conform to the resolution authorizing it, is based upon the fact that the mortgage provides that in case of default for six months the payment of interest, the whole principal and interest shall be due, while the resolution merely provides for the issue of bonds and a mortgage to secure the payment of \$3,000,000 in twenty-five years from the 1st of August, 1872, with interest at the rate of seven per cent. per annum, payable semi-annually. But the provision under consideration is manifestly not in contrariety to the resolution. It is necessary to render the bonds marketable, and it is nothing which the law itself would not grant; for, in the absence of such provision, upon such default and the commencement of foreclosure proceedings it would be within the power of the court to sell, if necessary, the entire premises for the purpose of raising as well the principal as unpaid interest. *Howell v. Western R. R., 4 Otto 463; 1 p. 117 § 74.*

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In this connection, the objection of the lack of power on the part of the company to make the mortgage may be disposed of. The supplement (February 2d, 1854) to the charter of The New Jersey, Hudson and Delaware Railroad Company (*P. L. 1854, p. 45*), gives to that company power to make its bonds without limitation, and to secure their payment by mortgage of its real and personal estates, franchises, &c.

The charter of The New Jersey Western Railroad Company authorizes it to borrow money not exceeding in amount two-thirds of the amount of its capital stock. The charter of The Sussex Valley Railroad Company authorizes it to raise money on its bonds and mortgages of its property and franchises for any sum not exceeding \$2,500,000. The New Jersey Midland Railway Company, by the act of consolidation, was clothed with all the rights, powers and privileges of the consolidated companies. The power to issue bonds under the charter of The New Jersey, Hudson and Delaware Railroad Company, it will be observed, was unlimited.

Nor is the objection to the sufficiency of the proof of the mortgage well taken. The mortgage, as before stated, was executed under the corporate seal of the company and the hands of its president, Cornelius A. Wortendyke, and its secretary, Hezekiah Watkins. The name of Eugene Smith appears as that of a subscribing witness. By the certificate of proof, which was made before a master in chancery, it appears that Mr. Watkins, the secretary, on the 17th of August, 1870, deposed that he knew the corporate seal of the company; that the seal affixed was that seal, and that it was affixed by the order of the directors; that Cornelius A. Wortendyke was the president, and signed his name to the instrument as such by the order of the directors, in the presence of the deponent, and that the latter signed his name to the instrument as secretary by like order. It also appears by the certificate, that, on the same day, Eugene Smith, the subscribing witness before mentioned, proved

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the execution of the instrument by the trustees. Whether Eugene Smith was, indeed, a witness to the execution of the instrument by the company, does not appear. The signature of Elezekiah Watkins, as secretary, to the deed may well be regarded as that of a subscribing witness to the execution of the instrument by the affixing of its corporate seal by order of the board. Though the instrument signed by both the president and the secretary in accordance with usage and the directions of the resolution, the signatures of both of those officers are placed there merely for the purpose of attesting the affixing of the seal of the company as a corporate act. The proof by the secretary is in compliance with the requirements of the statute as to the person by whom proof is to be made, and the proof itself is in accordance with law. It is objected that it does not appear that the contents were made known to the grantor but it is not necessary that that should appear in the proof of a deed or mortgage.

Nor can the objection that, in three of the counties through which the railroad passes, the transcription by which the record of the mortgage was made, was from a copy of the instrument, and not from the instrument itself, be sustained.

The mortgage appears, according to the certificates of the clerks of the counties, to have been recorded on different days; in Sussex, on the 30th of August; in Bergen, on the next day; in Passaic, on the 5th of September, and in Hudson, on the 8th of that month. In accordance with the custom in such cases, the original mortgage appears to have been produced to the clerk, in his office, with a true copy; the two were compared by the clerk, and he then marked the original as recorded, and subsequently made the copy in the book of records from the copy left with him. On this point it may be added that, as before stated, the subsequent mortgagees had actual notice by their bonds and mortgages of the existence of the first mortgage. The

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record is lawful, and was constructive notice to them and the judgment creditors.

Objection is made to the maintenance of this suit, on the ground that George Opdyke resigned his office of trustee, and that Abram S. Hewitt, also a trustee under the first mortgage, has not resigned. There is some evidence of the tender of his resignation by Mr. Opdyke, but there is no evidence that it was accepted before the beginning of the suit. There is evidence, also, that Mr. Hewitt resigned, but it does not appear clearly that the resignation was accepted. He is a party to this suit as trustee under the third mortgage, and, in view of the fact that he is a defendant, it would have been incongruous to have made him a complainant therein. There appears to be no doubt that he did relinquish the trust and that his resignation was accepted. Mr. Opdyke, notwithstanding the fact of his having tendered his resignation, has still seen fit to act as a trustee, and is a complainant accordingly. There would be no difficulty, under the circumstances, in adjusting, if necessary, the parties in accordance with the requirements of correct practice. The name of Mr. Opdyke could be stricken from the record, if it were improperly there.

By the terms of the mortgage, the estate thereby granted is granted to the trustees, their survivors or survivor, or their successors or successor and assigns, without words of inheritance. It is insisted, on the part of the defendants, Jackson, Hoxsey, Van Houten and Demarest, that the estate is merely an estate for the life of the last survivor of the trustees, and is not an estate in fee. And it is also insisted that, inasmuch as the complainants' bill contains no prayer for the reformation of the mortgage, it cannot be reformed in this suit. But, under the circumstances, the court would, if necessary to purposes of equity, permit an amendment of the bill by the insertion of a prayer for reformation.

The bill, however, contains a prayer for such further or other relief in the premises as the nature of the case may require. Under this prayer the court will find no difficulty

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in granting the relief and effectuating the intention of the parties in respect to the estate. By the mortgage it is provided that, in case of the entry of the trustees, in default of payment, they may sell the premises, and, as the attorney or attorneys of the railway company thereby duly constituted and appointed, execute and deliver to the purchaser or purchasers a good and sufficient deed or deeds of conveyance in law for the property, granting and assuring to him or them all such estate, right, property and interest, and to the same extent as the railway company had therein at the date of the mortgage, or at any time subsequent thereto; and that the sale, when fully consummated, shall be a perpetual bar, in law and equity, against the railway company and persons claiming or to claim the premises, or any part thereof, by, through or under them, subsequently to the date of the mortgage. The mortgage contains a covenant for further assurance, by which the railway company covenants to execute and deliver, or cause to be executed and delivered, all and every such further and reasonable deed of conveyance, assignments and assurances in law for the better and more effectually vesting and confirming the premises thereby granted, or intended so to be, as may be reasonably advised, devised or required.

It will be seen that, under the provision for sale, the trustees are empowered to convey all such estate in the mortgaged premises as the railway company had at the date of the mortgage or at any time afterwards. The trustees must have been clothed with the entire estate of the company in the mortgaged premises to enable them to execute the trust, and of this fact subsequent mortgagees, judgment creditors and purchasers had notice from the record itself, the mortgage having been recorded in full. *Randolph v. N. J. West Line R. R. Co.*, 1 Stew. 49. The mortgage would therefore, be reformed, if necessary, as against all such persons.

But, further, it is within the power of the court to direct the trustees to join in the conveyance to a purchaser un-

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the sale in foreclosure, if it should deem it proper so to do: **in** which case all the estate which the company had at the **date** of the mortgage, or acquired subsequently thereto, **would** pass to the purchaser. *Muller v. Dows, 4 Otto 444.*

Again, the act under and by virtue of which this mortgage was made, contemplates a mortgage of all the estate **of** the company, and the court will intend, in the absence **of** any evidence of a contrary design, that the estate which **the** company mortgaged to the trustees, in pursuance of **that** authority, was not less than was contemplated by the **act**. As to the rights of way, it may be remarked that, the **company's** estate therein is not a fee.

The complainants' mortgage was duly executed, pursuant **to** lawful authority, was duly recorded, and conveys all the **estate** which the company had in the mortgaged premises **when** it was made, or at any time afterwards.

The chattel mortgage given to Terhune and Olmstead, **trustees**, in January or February, 1875, upon the equipment of the railroad, to secure the payment of \$88,588.08, was intended to indemnify directors of the company for their loans to it, payments for it, or liabilities incurred in its behalf. All the *cestuis que trust* (with the exception of the Union Bank of Jersey City, the Hudson County National Bank, the Delaware and Hudson Canal Co., M. K. Jessup & Co., and the receivers of the New York and Oswego Midland Railway Company) were directors of the company, and on the debts of those other persons or corporations those directors, or some of them, were liable as sureties, and the mortgage was in fact made, so far as those debts were concerned, to indemnify them against that liability. That the mortgage was intended merely as such indemnity is evident from the resolution under which it was made. It is as follows:

"Whereas, it has been, and is necessary, from time to time, to borrow money in addition to the earnings of the road, to enable the company to purchase rolling stock, pay interest, claims for right of way, rental of the Unionville Road, and for other purposes necessary for

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the operation of the road; and, whereas, the depressed state of the securities of the company is such that loans cannot be negotiated without the personal endorsements of the directors of the company therefore, resolved, that in order to save harmless and protect the directors against loss by reason of such endorsements, the president be and he is hereby, authorized to execute a mortgage on the property of this company, both real and personal, to Samuel E. Olmstead and R. P. Terhune, as trustees, for the protection, security and payment of such endorsed paper as will save the directors harmless from any loss whatever by reason of such endorsements, in case the said endorsed paper, notes or acceptances be not paid at maturity by the company.'

The answer of Terhune and Olmstead alleges that the mortgage was given to secure the payment of money advanced to the railroad company. All the directors for whose benefit the mortgage was made, knew of the existence of the complainants' mortgage, and of the second and the third mortgages, when the resolution was passed. They are not, therefore, entitled to the benefit of the act concerning mortgages (*Rev. p. 709 § 39*); for, having had notice, they are not mortgagees in good faith. *Williamson v. N. J. Southern R. R. Co.*, 2 *Stew.* 311, 336. Said the court of errors and appeals in that case: "Purchasers or mortgagees, in order to take advantage of the failure of another mortgagee of chattels to comply with the statute, must be subsequent purchasers or mortgagees, taking their title under the mortgagor in good faith. A purchaser or mortgagee acquiring his rights with notice of the existence of the antecedent mortgage, does not obtain his title in good faith." In their answer, Terhune and Olmstead do not allege that they or their *cestuis que trust* had not notice of the three prior mortgages.

Again, while the directors of the railroad company were not chargeable with any duty in regard to the filing of the first, second and third mortgages, or any of them, they were prohibited by their official relation to the company, and as being themselves part of the company as stockholders, from acquiring any lien by mortgage for their own security as against the mortgagees in those mortgages. As between

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the mortgagees and the company, the mortgages were valid as to the chattels without filing. They were equally good against the directors and stockholders. For this reason, too, the directors, for whose benefit the chattel mortgage was made, cannot be regarded as mortgagees in good faith.

It is very manifest that the mortgage was made in view of the insolvency of the company. The resolution under which it was made, shows it. The mortgage was executed on the 12th of February, 1875. The company had then made default in the payment of the interest due on the mortgages, and on the 8th day of March following, less than a month afterwards, a receiver was appointed under proceedings in insolvency against the company in this court.

It is clear, from the proof, that the mortgage in question was the result of an attempt on the part of the directors for whose benefit it was made, to obtain security and indemnity for themselves with respect to money due them from, and liabilities which they had incurred for, the company, out of the personal property which they well knew was mortgaged to the bondholders, but which they nevertheless supposed might be available to them as against those bondholders, because of the omission of the trustees to file the mortgages. It is unnecessary to consider the other objections made to the mortgage in question. The complainants' mortgage is entitled to priority over the chattel mortgage, and so are the second and third mortgages.

The complainants' mortgage and the second and third mortgages are not valid as against the judgment creditors who have answered, and who have issued execution upon their judgments. By the delivery of execution to the sheriff they acquired a lien upon the personal chattels of the defendant in execution (the railroad company) as against all persons except *bona fide* purchasers, purchasing in market overt or under circumstances equivalent thereto. *Rev. pp. 392, 393 §§ 18, 20; James v. Burnet, Spen. 635, 639.* The act of 1876 (*Rev. p. 924 § 86*), which renders unnecessary the filing of mortgages of franchises and chattels combined,

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provided they be duly lodged for registry, does not divest the lien of the executions under the judgments, because the executions were delivered to the sheriff before the passage of that act. *Williamson v. N. J. Southern R. R. Co.*, 2 *Stew.* 336. The judgments of Inglis, of Van Houten and Demarest, of Terhune (assignee of Goetchius), and the judgment of Hoxsey (assignee of Vandervoort and Felch), are entitled to priority as to the chattels, over the first, second and third mortgages. *Hale v. Sweet*, 40 *N. Y.* 97; *Stewart v. Beale*, 7 *Hun* 405; *Thomas on Mort.* 493.

It is urged that there is no proof of levy under some, if there is under any, of the judgments, and that the executions issued thereon having been returned, no lien can be established under them. But it is to be remembered that the complainants made successful application for a receiver in this suit, in March, 1875. Since the appointment of the receivers, which was made in that month, the chattels have been in the custody of this court, and, therefore, the judgment creditors could make no levy thereon, as otherwise they might have done and with effect. The law rendering unnecessary the filing of a railroad mortgage of franchises and chattels, in order to hold a lien on the latter, was not passed until 1876.

The judgment of David D. Hennion and others appears to have been recovered November 13th, 1873, in the supreme court of this state, against the New Jersey Midland Railway Company, for \$869.61, in proceedings on an appeal from an award of commissioners made under condemnation proceedings instituted under the charter of the railroad company, to take the land of the plaintiffs therein, and the amount of the judgment is the amount of the verdict for the value of the land and damages, together with the costs of suit. This judgment has not been paid, nor has any part of it. The plaintiffs claim for it priority in payment as to the amount awarded for the value of the land taken by the proceedings in condemnation and damages. This lien is asserted by them as being in the

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nature of a vendor's lien for unpaid purchase-money, and it is insisted by the mortgagees that the judgment itself, which is a lien upon all the property of the railroad company, is a waiver of the lien, if it ever existed. But the claim, though it might be put upon the ground upon which a vendor's lien is sustained, may be better and, perhaps, more securely rested on the constitutional ground by which the right to just compensation is secured to the land owner under proceedings by virtue of the right of eminent domain.

It may also be remarked, that the charters of the New Jersey, Hudson and Delaware, New Jersey Western and Sussex Valley Railroad Companies, all provide that the money awarded to be paid on condemnation shall constitute a lien on the property of the company in the nature of a mortgage. The judgment, if it were an ordinary judgment for the amount of the award and costs, would not be more extensive in its lien than the provision of the acts just referred to, which extends to the entire property of the company, and, notwithstanding the lien under the provisions of the charters or under the judgment, the right to compensation would still be enforceable in equity against the land itself, in view of the constitutional prohibition and the provision for indemnity before alluded to. The first, second and third mortgages extend to and cover this property only by virtue of the provisions therein contained as to property to be acquired in the future. They must take it *cum onere*. *Williamson v. N. J. Southern R. R. Co.*, 1 Stew. 277; *S. C. on appeal*, 2 Stew. 311. The preference claimed for this judgment on the land taken will, therefore, be allowed.

The defendants, Van Houten and Demarest, claim under their judgment, which was recovered January 19th, 1874, in the Passaic circuit court, against the Midland Railway Company, for \$2,797.71, and also under a deed for a portion of the mortgaged premises acquired by the company for a depot-house or station, with its curtilage, in Paterson, and

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which was sold and conveyed to Van Houten and Demarest by the sheriff of the county of Passaic under their judgment and in satisfaction of part of the amount of it. The judgment was recovered upon a mechanics lien claim. The work and materials for which it was recovered were finished, however, subsequently to the recording of the three mortgages. The lien claimed by virtue thereof is subsequent and subject to the lien of those mortgages, and consequently the title under the sheriff's deed is subject to the mortgages. The lien for the unpaid balance of the judgment is, of course, subsequent to the mortgages as to real estate, but as to the chattels it is prior. It is urged that the property sold and conveyed by the sheriff was outside of the line of the railway, and was, therefore, not subject to the mortgages; but it was property acquired for the purposes of a station, and was, in fact, adapted and devoted to that purpose by the erection of the building in respect to which the lien was claimed. It was property connected with the main line of the railroad, and is to be regarded as part of the mortgaged premises. *State v. Mansfield*, 3 Zab. 510.

Cornelius T. Demarest and others, in behalf of themselves and others who were employes of the railroad company when the decree of insolvency was made, claim preference in payment for the wages due them at that time. The amount is about \$61,000. It is alleged to be due to the employes for wages, and to boarding-house keepers board furnished, at the request of the company, to the employes, during the months of November and December, 1874, and January and February, 1875. It is insisted that as these wages were earned and the board furnished at the interest upon the complainants' mortgage now in default, was in default, and the complainants, as mortgagees in trust, were entitled, under the provisions of the mortgage, on reason of such default, to take and hold possession of the mortgaged franchises and property and apply the income in the first place, to the payment of the expenses of or

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ating the road; therefore, the employes and those who furnished the board are entitled, as against the mortgagees, to the same priority to which they would have been entitled had the trustees taken possession and the services been rendered to them. It is further insisted that the services rendered by the employes were of great value to the mortgagees in maintaining and preserving the mortgaged franchises and property; that the mortgagees and the *cestuis que trust* were aware of the insolvency of the company, while the employes and those who furnished the board were not, and that, therefore, in equity, the wages and the money due for board should be charged upon the mortgaged franchises and property prior to the mortgage debt, and be paid out of the income and profits of the railroad, if sufficient for the purpose, and if not, then out of the proceeds of the sale of the premises. Of the claim, \$57,331.45 are for wages. The balance, \$638.28, appear to be, not for board, but for orders and loans.

By the act approved February 12th, 1874, "for the relief of citizens on the line of any railroad that has, or may hereafter fail or neglect to operate," it is provided that whenever the chancellor shall appoint a receiver of any railroad, the receiver shall apply all unencumbered personal effects and all moneys which may be transferred to him at the time of entering upon his duties as such receiver, to the payment of wages at that time due the employes of the company, and that the chancellor may from time to time make such orders as he may deem proper to equitably carry out the provision, provided that no such payment shall be made for more than two months' wages. (*Rev. p. 943 § 161.*) By virtue of that act, the employes are entitled to a lien on the unencumbered property of the company, and on its encumbered property subject to existing encumbrances, for the wages, not exceeding wages for two months, due to them when Mr. Hobart entered on his duties as receiver. *Williamson v. N. J. Southern R. R. Co.*, 1 Stew. 277.

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By the act concerning corporations (*Rev. p. 188 § 63*), is provided that in case of the insolvency of any corporation all laborers in the employ thereof shall have a lien upon the assets for the amount of wages due to them respectively which shall be paid prior to any other debts of the company. This act was passed in 1875. The lien which it gives cannot be extended so as to impair the obligation of duly recorded encumbrances antecedent to the act.

The subject of the construction to be given to such an act was considered in *Williamson v. N. J. Southern R. R.*, *ubi supra* in connection with the act of 1874, and it was there held that the lien of employes under that act could not be extended beyond the provisions of the act, which, though it would receive a reasonable construction, could not, of course, be construed as to diminish or impair the obligations or lien of judgment creditors or mortgagees whose encumbrances existed before the passage of the act. See *Jones on Rail Road Securities § 557*.

As before stated, Garret A. Hobart was appointed receiver of the company in insolvency on the 8th of March, 1875, and he and James W. McCulloh were appointed receivers of mortgaged property in this suit, March 30th, 1875, twenty-two days afterwards. *Prima facie*, at least, the net income which has been received since the latter took possession of the road, is applicable to the payment of the mortgage encumbrances which are prior to the claims of the employes. It does not appear that there will be enough without the income to pay those prior debts.

In a recent case, *Fosdick v. Schall*, decided in the United States supreme court, October term, 1878 (8 Cent. L. J. 2), it was held that though the income of mortgaged road premises in the hands of a receiver, in a suit to foreclose the mortgage, *prima facie* belongs to the mortgagee, yet the court may deal with it according to equity, and apply it to the payment of the unsecured claims for labor, supplies and the like, which, but for the diversion of funds by the company to the payment of the mortgage

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instead of paying those claims, would have been applied in the ordinary course of business to the satisfaction thereof. The grounds on which the decision rests are the power of the court to do equity, in the imposition of equitable terms, at the time when its aid is invoked by the mortgagee for the realization of the money due him on his security, and an equity found to exist from what is characterized as the diversion of funds in the payment by the mortgagor while in possession, to the mortgagee, of money, net income of the premises, which, in the ordinary course of business and equitably, should have been applied to the payment of the debts for labor, supplies, &c. In the case before me the claim of the employes is not put on either of those grounds, but on the ground of the equity which, it is insisted, arises from the fact that the mortgagees did not take possession, as they might have done, under the mortgage, of the mortgaged premises, after default, and that they were aware of the insolvency which occasioned the default, while the employes were not.

The claim could not have been successfully put on either of the grounds taken in *Fosdick v. Schall*, for no terms of payment of these debts were imposed when the receivers were appointed, and it does not appear that there has been any diversion of funds to the mortgagees, for the default in payment of interest occurred long before the claims for labor accrued, and there has been no payment on account of principal or interest of the mortgages since the debts for labor were contracted. Said the court in *Fosdick v. Schall*: "The power rests upon the fact that, in the administration of the affairs of the company, the mortgage creditors have got possession of that which, in equity, belongs to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that, if there has been in reality no diversion, there can be no restoration, and that the amount of restoration should be made to depend on the amount of the diversion."

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It will be seen that this decision is not in accord with that in *Duncan v. Trustees of the Chesapeake and Ohio R. Co.*, 9 *Amer. Railw. Rep.* 386, where the ground was taken that a railroad company is to be regarded, after default, mere agents of the mortgagee, so far as the wages of employees are concerned, and on foreclosure the mortgagor will be required to pay out of the earnings, or out of the proceeds of the sale of the premises, the wages of the employees in arrear. Nor is it in accord with the decision in *Douglass v. Cline*, 12 *Bush* 608, where it was held that the right of the mortgagee to have his money raised out of the mortgaged premises as against unsecured creditors, is equitable only, and therefore the court, in granting it, may impose reasonable conditions, either on appointing a receiver, or afterwards.

The claim made on the ground of knowledge on the part of the mortgagees and their *cestuis que trust* of the default in payment of interest, and the power of the former to take possession under the mortgage, and the ignorance of the employees of the existence of the default, is not sustainable. The mortgagees owed to the employees of the mortgagor no duty under the circumstances. They were at liberty to refrain from taking possession if and as they saw fit, and by so doing they incurred no liability to the employees of the mortgagor to indemnify them on the contracts, express or implied, of the latter with them for the payment of the wages. The mortgages were on record, and the record was notice to all. It surely would not be claimed that the holder of a mortgage past due upon a farm is liable, merely because he is mortgagee, for the wages of the hands employed by the mortgagor in working the farm after default; nor that the holder of a mortgage upon a factory is, merely because he is mortgagee, liable for the wages of the workmen who may be employed by the mortgagor in operating the works after default, although it may have been of the greatest importance to the mortgagee's security that the farm, in the one case, should not go untilled, or the factory, in the

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other, remain idle. The doctrine of salvage is an admiralty doctrine, and has not been adopted by this court.

Said the court, in *Galveston R. R. v. Cowdrey*, 11 Wall. 459, 482: "As to the other points, giving priority to the last creditor for aiding to conserve the thing, all that is necessary to say is, that the rule referred to has never been introduced into our laws except in maritime cases, which stand on a particular reason." It is due to the proper administration of justice that the rights of all parties shall be clearly understood and strictly respected, and recourse is not to be had to devices, either by way of refinement in the application of principles or the introduction of new doctrines to effect purposes which, however commendable in their design, result, in operation, in taking the property of one man to pay another's debt, and in creating liens in favor of one class of creditors to override the existing lawful liens of others, which is neither according to law or equity, and is in violation of constitutional rights. The consequences of creating such liens as that which is insisted on in this case in behalf of the employes, are easily foreseen. Such liens could not be confined to that class of meritorious creditors, but must be extended to all others with claims equally meritorious, though not for the wages of labor. They must, on principle, be extended to those who have furnished supplies of any kind necessary for the operation of the road, and to all who have lent or advanced money which was necessary to keep it in operation.

The claims of directors of the Midland Company to subrogation to the rights of the vendors of rolling stock are to be considered. That stock was held by the company under agreements, by which the purchase-money was to be paid in certain installments, and, in default of payment, it was to forfeit all money paid on account of the price and give up possession; the vendors, by the agreement, retaining the title until all the installments should have been paid in full. The claims are made with respect to advances which were made in 1874, by Hezekiah Watkins, Dewitt C. Littlejohn,

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Cornelius A. Wortendyke, Henry R. Low, Richard P. Terhune, Samuel E. Olmstead, John N. Gamewell, Garret A. Hobart and Edward T. Bell, all of whom were directors of the company when the advances were made. The company was then insolvent and without credit. The advances were necessary to enable it to make payments on the contract and, therefore, to secure to it and to those who might have liens upon the rolling stock or on the road, the benefit of the installments already paid, and, also, to secure to the company and its mortgagees the continued use of the rolling stock, without which the operation of the road must have ceased. The advances amounted to about \$20,000. Messrs. Wortendyke, Littlejohn, Watkins, Low and Terhune were guarantors on the contracts. It seems to me quite clear that, for the repayment of the money so advanced, an equitable lien should be established. The claim to such lien cannot be successfully resisted on the ground that the advances were merely voluntary; for it is clearly proved that they were made on the understanding that those to whom they were made should be subrogated, in respect to them, to the rights of the vendors. It is true, this understanding was merely with the members of the board, and was not expressed in such a way as to be legally binding on the company, for the board passed no resolution on the subject; undoubtedly, merely because it was not supposed that any was necessary. The fact that such an understanding did exist and was relied upon as security for the repayment of the money, makes it impossible to treat the advances as merely voluntary or as mere loans to the company on no credit. The proof is that they would not have been made on the credit of the company, nor would they have been made at all, except on that understanding. The fact that the understanding was not put into the shape of a resolution of the board cannot, under the circumstances, change the character of the action of those by whom they were made nor ought it to deprive them of their equity. It was said in this matter, in *Coe v. N. J. Midland Railway Co.*, 12 C. .

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Gr. 110, 113, that those who made the advances were directors, and, therefore, stood in the relation of trustees, and so were entitled to re-imbursement out of the trust property for the advances made by them to save the property, and that it would be gross injustice to give to the mortgagees or other creditors of the company, under the circumstances, the benefit of the advances at the expense of those by whom they were so made. It is said, however, that this view was not only not concurred in by the court of errors and appeals in its review of that case (*Receivers &c. v. Wortendyke, 12 C. E. Gr. 658*), but was repudiated. I do not so understand the opinion. It declares, indeed, that payments by directors to secure the property of the corporation do not of themselves entitle them to conventional subrogation, which is undoubtedly true. But there is more in this case. There is the fact that the advances were made on the faith of an understanding that those who made them should have an equitable lien for them.

This case appears to me to be entirely within the principle of *Paine v. Hathaway, 3 Vt. 212*, where it was held that if one who had agreed with a debtor to advance the money (to be secured by mortgage on land) to discharge a debt secured by encumbrance on the land, himself pays the debt and discharges the encumbrance, he is entitled to subrogation, and cannot be regarded as a volunteer or a stranger with regard to the debt he has paid, but, in equity, is entitled to the benefit of the security which he has satisfied with the expectation of receiving a new lien on the land therefor. *Dixon on Subrogation 165*. By the civil law, a third person might acquire the right of subrogation by agreement with the debtor that, upon paying the debt for him, he should be substituted in the place of the debtor; the fact that payment was made with the lender's money was, however, to be mentioned in the acquittance. And it was the same thing if the money was handed to the debtor, and paid by him, if he mentioned the fact that it was with the money of the lender that the debt was paid. *Domat § 1781*.

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So that it made no difference whether the money was paid over directly by the lender to the creditor or was paid by the debtor to be paid to the creditor.

The real question in all such cases is, whether the payment made by the stranger was a loan to the debtor through a mere desire to aid him, or whether it was made with the expectation of being substituted in the place of the creditor. If the former, he is not entitled to subrogation; if the latter, he is. By the substitution, no injury is done to any creditor; and it seems quite clear that equity should not permit the just expectation of the lender to be disappointed where the debtor is a corporation, merely because the agreement for substitution was not put into such a shape as to be legally binding on the borrower. It was the duty of the board, in this case, to pass a resolution, or otherwise evidence the agreement, on the faith of which the money was paid. The company, on the faith of the agreement, received about \$20,000 of the private funds of the person who made the advances, which were of the utmost advantage to the mortgagees, in saving the rolling stock, and none whatever to the lenders. Every dictate of justice demands that the advances be secured by an equitable lien on the property in respect to which they were made. The persons who made these advances were, as has been stated, directors, and not only might, but undoubtedly would, have passed any resolution, or authorized the execution of an instrument, which they had thought necessary for their protection in making the contemplated payments. The fact that they were directors is not without importance otherwise in this connection. They held a fiduciary relation to the company, and, also, under the circumstances, to the mortgagees. At least, they were not strangers. The company had no money with which to save the property in their hands. They would not lend the money to it on its own credit, for it had, as they well knew, no means of repaying it. A guardian who, having no funds of his ward, pays the debt of the latter, would be entitled to subrogation on ver

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obvious grounds. *Dixon on Subrogation* 147. The same principle is applicable to the case in hand. Nor is there any danger to be apprehended from such a precedent. It is, manifestly, in accordance with the plainest dictates of justice. It will violate no principle. It cannot give countenance to claims for subrogation not founded on right, for the strength of the position is, that the payment was, in fact, made on the faith of subrogation, and on that alone. If the proper resolution had been passed, there would have been no room to question the right to conventional subrogation. Under the circumstances, equity may well supply the lack of the formal resolution.

Again, some of those who made the advances were, as before stated, guarantors, and, therefore, bound for the payment. As to their claim to subrogation, there cannot be any doubt.

Nor will the fact that it cannot be ascertained, from the evidence, what amount was advanced by any one, on any of the contracts, defeat the equity. Mr. Wortendyke says the money advanced was paid on all the contracts. The evidence, indeed, is not sufficiently definite to enable the court to declare the particular lien of any of those who made the advances on any particular property, and it seems doubtful whether it could be made more definite. The money appears to have been paid into the treasury of the company, and to have been paid out therefrom upon the contracts, as if it were the money of the company. But it was advanced and used to make certain payments on all the contracts, and those who made the advances are all together entitled to the credit of those payments, and the contribution of each one to them is proved. Of course, the lien hereby declared can only attach subject to the rights of the vendors. But it is not to be postponed to the payments made by the receivers. They were made for the mortgagees. Nor will the fact that efforts have been made by some of these directors to obtain indemnity out of the assets of the company, deprive them of their right to the

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lien; for they have received no actual indemnity, and they may be required to deliver up all that they have received stock &c., on that account, as a condition of granting the lien.

The mortgage of the Hudson Connecting Railway Company held by E. Ellery Anderson, trustee, given originally to James P. Wallace, trustee, is dated January 1st, 1872 and purports to convey the line of railway then (as the mortgage states) known and to be known as the Hudson Connecting Railway, as the same was being and should be constructed from the Newark and New York Railroad at West Bergen, near Jersey City, northerly to a point in the New Jersey Midland Railway, south of the division line between the counties of Hudson and Bergen, and also to the Montclair Railway at or near Snake Hill, in the county of Hudson, comprising about ten miles of railway connecting the roads of the Newark and New York Railroad Company, the New Jersey Railroad and Transportation Company, the Morris and Essex Railroad Company, the Erie Railway Company, the Northern Railroad Company, and the New Jersey Midland Railway Company, with its road and with each other, including all the railway &c. then held or acquired, or thereafter to be held or acquired, by the Hudson Connecting Railway Company, its successors or assigns for use in connection with its railway, and all its franchises and appurtenances &c. It was made to secure bonds of the Hudson Connecting Railway Company, amounting in all to \$400,000, called first mortgage bonds, and passing by delivery or transfer on the books of the company. The trustee representing the holders of the bonds secured by this mortgage, insists that the mortgage is a good and valid encumbrance upon all the property mentioned and described therein; while, on the other hand, the holders of the encumbrances on the New Jersey Midland Railway insist that the mortgage is not valid, because, as they allege, the mortgaged railroads therein described, excepting so much as extends from the Newark and New York Railroad to

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West End, and from the Midland Railway to the Montclair Railway at Snake Hill, were built, and the land or right of way purchased with, the money of and by the Midland Railway Company.

The Hudson Connecting Railway Company was incorporated by act of the legislature, approved April 1st, 1869 (*P. L. 1869, p. 1063*). By its charter, its incorporators were authorized and invested with all the rights and powers necessary to construct one or more railways in the county of Hudson, to connect the several railways therein; and the company was authorized to make its bonds, and, for the purpose of securing their payment, to mortgage its real estate and personal property, the railway or railways, and all the appurtenances, franchises, powers, privileges and rights belonging thereto which it might possess under its charter, to such an amount as it might deem for its best interest, without the invalidation thereof by virtue of any statute of this state. And it was provided that the bonds and mortgages so sold or negotiated should be valid and binding in law and equity, and that the purchaser or purchasers under decree of foreclosure founded upon the mortgage, should be invested with all the authority, rights, franchises, powers and privileges which were, by the act, or might thereafter be, conferred upon or possessed by the company under its charter, and to all the assets and rights which might be acquired by the company, either by condemnation as by the act provided, or by contract or purchase, or other mode of acquisition consistent with the charter.

The company was organized on the 17th of May, 1869. By resolution, passed on that day, Delos E. Culver was directed to cause surveys to be made, to be presented to the board of directors, for the construction of the railway from the Newark and New York Railroad along the westerly slope of Bergen Hill, northerly, to connect all the steam railroads together; and on the 9th of May, 1871, about two years afterwards, the location, maps and plans of the portion of the railway which it was then proposed to build,

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were laid before the board, and it was then resolved : ordered that the location and maps be filed, according law, from the Newark and New York Railroad northerly some point on the New Jersey Midland Railroad, northe to the county road (so called because it leads to the cou house on Snake Hill), and also of a railway to connect w the New Jersey Railroad from the main line, and also to connect with the Montclair Railway. The location : survey of the portion of the Hudson Connecting Railw from the Newark and New York Railroad to the road the Northern Railroad of New Jersey, made in pursua of this resolution, was filed on the 29th of June, 1871. Another location was filed November, 1871, extending fr the Pennsylvania Railroad (the New Jersey Railroad : Transportation Company's railroad) to the county r north of the crossing of the Erie Railway Company. the 28th of March, 1872, a further location and survey w filed, to cover the route of the road from the Midland R way at Van Keuren avenue, and running thence northw erly to the main line of the Montclair Railway; and 1874 it filed another location and survey of the part of road between the Secaucus and county roads.

The New Jersey Midland Railway Company, up to spring of 1871, intended to reach the Hudson river b direct route, but having then discovered that the expe of any such route, by reason of the obstruction presen by Bergen Hill, would be so great as to render it impra cable, it thereupon sought to make a connection of its r with that of the Pennsylvania Railroad Company, and t reach the river over the latter road. With that view filed, on the 12th of July, 1871, a location of a branch l (as it is called in the survey) of its road from a point ther near Bellman's Creek, to the Pennsylvania Railroad at W End. This location is from the latter place to a point the land of Van Keuren, identical with the survey and l tion of the Hudson Connecting Company, of June 29 1871, between those points, and part of it (i. e. from W

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End to the county road) is identical with the survey of the latter company of November, 1871. In the spring of 1871, the Midland Company set about acquiring the title to land for its road to West End, and in that spring and the following summer acquired much of the land which was required. It found some difficulty, arising from want of power, as it was adjudged, in acquiring the title to lands of certain corporations, by condemnation. Inasmuch as it was necessary to acquire this land, its management had recourse to the charter of the Connecting Company for the purpose, and condemnation proceedings were accordingly taken in the name of the latter company in the winter of 1871-2 and spring of 1872. The land which was acquired, whether by condemnation or otherwise, for the road, was paid for by the Midland Company. On the other hand, of the Hudson Connecting Company's bonds, secured by the mortgage before mentioned, there were, about the 1st of May, 1872, received by the management of the Midland Company, \$166,000, reckoning the bonds at their par value. The bonds so received by the Midland Company were used for its benefit. It pledged them to the Chemung Canal Bank as security for a loan of \$100,000. The loan was subsequently paid—partly by the proceeds of the sale of the bonds, which were sold by the bank at eight cents on the dollar, or thereabouts. The money received from the bank (the \$100,000) was applied, part to the payment of interest on the first mortgage bonds of the Midland Company, and the rest used in its business generally. It does not appear clearly what was done with the rest of the Connecting Company's bonds, except that \$84,000, par value, went to the Montclair Company; but it would seem that they were in some way used by the New York and Oswego Midland Company, or its president, for the benefit of the New Jersey Midland and Montclair Companies.

The question between the mortgagees of the Midland Company and those of the Connecting Company is, as to the part of the road operated by the former from the county

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road to West End. On the one hand, the former insist that recourse was had to the charter of the Connecting Company merely to bridge over a difficulty, and as a means of acquiring title to land for the Midland Company, which it could not otherwise obtain without considerable and injurious delay in litigation to vindicate its right, or in obtaining further legislation, and that, inasmuch as the money to pay for the land so taken by condemnation was paid by the Midland Company, a trust resulted to it in the land in the hands of the Connecting Company. They also insist, and it appears that the title to the greater part of the land on which the railroad was built, was taken in the name of the Midland Company, and, as before stated, the money to build the road was furnished by it. They further insist that the Connecting Company had no existence except to enable the Midland Company to obtain title under the charter of the former and that its organization was merely for that purpose and to that end, and when that purpose and end had been accomplished, its organization practically ceased; and that the Midland Company having thus obtained, through the use of the Connecting Company, land which it needed and could not otherwise acquire, is entitled to hold it under the circumstances, as against the bondholders of the Connecting Company. On the other hand, the bondholders of the latter company insist that it had a lawful and valid organization and existence; that the right of location over the route on which the road was built was granted to it by the Midland Company, and that it located the road accordingly and made its contract for the building of the road in its own name, paid for it in its stock, part of which went to the Midland Company, and the rest to the Montclair Company that the money requisite to pay the contractor was thus raised, and that a part of the land covered by the Connecting Company mortgage (all of the land on which the road in dispute is) was, after the Connecting Company's mortgage was given, conveyed by the Midland Company to the former company, the Midland Company taking in return

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the still subsisting lease of it. They also insist that the complainants' mortgage does not cover the road in dispute, because the Midland Company had no power to build it, and, if it had, it did not contemplate building it when the mortgage was given.

Although the Midland Company undoubtedly intended and expected, when its mortgages were made, to reach the Hudson river by a direct route, and did not contemplate being compelled to reach it by means of the connection at West End with the Pennsylvania Railroad; and though the mortgage to the complainants describes the road as a line of railroad known and to be known as the New Jersey Midland Railway, as the same was then being, and should be, constructed, from the state line at or near Unionville, in the state of New York, to the Hudson river, the mortgage also covers, by its terms, all real or personal property then held or acquired, or thereafter to be held or acquired, by the company, its successors or assigns, for use in connection with that railway, or with any part thereof, or with the business thereof, and all the franchises of the corporation. The covenant, for further assurance, provides for the conveyance of any property acquired by the company subsequently to the date of the mortgage, and comprehended in the description contained in the mortgage, if any such there should be which should not inure to the use and benefit of the holders of the bonds under the terms and covenants of the mortgage.

The location of the New Jersey, Hudson and Delaware Railroad Company, made before consolidation, struck the Hudson river at the Weehawken ferry; and it was intended by that location to pass through the hill, and so reach the river. After the consolidation, and when the construction of the road had commenced, and for a year afterwards, the route of the Midland Company was, according to the map and location, filed September, 1870, at the east end, as follows: from Bellman's creek, going up the side of the hill; then down King's ravine, and then entering Hoboken and

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reaching the river in the cove south of the Delaware and Hudson coal dock, two miles north of the Long Dock tunnel. But the fact that the road in question was not contemplated by the mortgagor when the mortgage was made, is not enough of itself to exclude it from the lien of the instrument. If the building of it was within the mortgage franchises, and it was not excluded by the terms of the mortgage, it would be embraced in it.

In *Randolph v. N. J. West Line R. R.*, 1 Stew. 49, a railroad company mortgaged its railroad, describing it as a single and singular the railroad of the New Jersey West Line Railroad Company, and the appurtenances thereto belonging, acquired and to be acquired, constructed and to be constructed through and along the entire main line of the company's railroad, from the eastern terminus of the railroad, at the city of Newark, westerly across the state of New Jersey to the westward terminus of the railroad at the Pennsylvania state line, including in the description all the property, franchises, rights and things of whatsoever name or nature then held, or which should be thereafter held or acquired, by the company or their successors or assigns, pertaining to the said main line of the railroad, or the equipment thereof; together with the tenements, hereditaments and appurtenances to the said main line of railroad, lands and premises, or either thereof, belonging &c. By a subsequent act of the legislature, authority was given to the company to extend the road from Newark eastward to the Hudson river. It was held that it did not appear that the extension was contemplated when the mortgage was made and that it was no part of the main line as described in the mortgage; that the franchise granted by the subsequent act was not acquired for use as part of the main line, nor did it pertain thereto; that it was indeed acquired for use in connection with the main line, but it was to build another road and that it was not within the terms of the mortgage or its covenants, and therefore was not covered by the mortgage.

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In that case, it will be perceived, it was expressly the main line of the railroad which was mortgaged, and its termini were given, beginning at Newark and ending at the Pennsylvania state line. The act by which the extension was authorized was not in existence when the mortgage was made, and, so far as appeared, was not in contemplation. It was clear that the extension should be treated as a road not within the terms of the mortgage or within the contemplation of the parties to that instrument. The company had no power to build the extension when the mortgage was given, and the extension could not, therefore, be held to have been in contemplation. In this case, however, it appears that the original design to reach the Hudson river, by a very direct route, was abandoned by reason of its impracticability on account of its expensiveness, and thereupon the company sought to reach the river by the best means available to it, by what it called a branch road and the Pennsylvania Railroad. The Midland Company had power, under its charter, to build the road to West End. Though, under the charter of the New Jersey, Hudson and Delaware Company, it had not the power to build south of the turnpike (*i. e.* it lacked the power to make an actual connection with the Pennsylvania Railroad), that connection could have been effected by the consent of the Pennsylvania Company. But, under the charter of the Western Company, it had ample power to connect with any other railroad or railroads in the county of Hudson (*P. L. 1870, p. 580*). Nor would the fact that the Midland Company's charter power was not, if such had been the case, sufficient to enable it to condemn some, or even all, of the land requisite to build the road, defeat the right to build, for the right to the land might have been acquired by purchase. The road from Bellman's creek to West End was built under the charter of the Midland Company. From Bellman's creek to the county road it was built on the location of the Midland Company. The Connecting Company has never made any location of that part of the route from Bellman's creek

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towards West End which is between the creek and the middle of the Secaucus road. As to another part, from the Secaucus road southwardly to the county road, the Connecting Company had no location until April 9th, 1871, long after the road had been completed, and more than two years after the making of the Connecting Company's mortgage. For the part from the county road southwardly to a point in the lands of Van Keuren, which point was the termination of a survey and location filed by the Connecting Company, June 29th, 1871, by which it located its road from the Newark and New York Railroad to the railroad of the Northern Railroad Company, it had no location until November 8th, 1871, and the location which it filed at that date was made for its whole length, on a location previously made by the Midland Company and duly filed July 12th, 1871. The last-mentioned location and survey gave the Midland Company the right of location (*Morris & Essex R. Co. v. Blair*, 1 Stock. 635). Although the filing of the location of November, 1871, by the Connecting Company was through the instrumentality of the officers of the Midland Company, or some of them, the hand of that corporation, as such, does not appear in it. It was done merely as a means to an end, and the end to be accomplished was the condemnation of property for the Midland Company under the Connecting Company's charter. That such only was the object and purpose of that location is evidenced by the fact before suggested, that there was no relinquishment by the Midland Company, as such, and the fact that in a survey and location filed in March, 1872, by the Connecting Company, of a road called the Montclair Branch, the beginning point is stated to be a point in the New Jersey Midland Railway, thus designating the road in question as the road of the Midland Company more than four months after the location and survey of November, 1871, had been filed. It should be added, that the entire evidence shows conclusively that the location and survey of November, 1871, were filed merely with a view to the proceedings in condemnation.

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which it was proposed to take in the name of the Connecting Company for the benefit of the Midland Company, and which could not have been taken without filing the location and survey in the name of the Connecting Company. As to the rest of the road to West End, though the Connecting Company filed a location in June, 1871, it did not build upon it, but, with full knowledge, permitted the Midland Company, in July following, to take the location as its own and build its road upon it. It appears to have no title, except under the deed of 1873, to any of the land on which that part of the road is built, but the Midland Company bought and paid for, and took title to, all of it. Not only was the road in question built on the location of the Midland Company, but it was built by and with the money of that company. Henry R. Low, treasurer of the Midland Company, testifies that the Midland Company paid, for the right of way, about \$100,000; for construction, about \$150,000, and subsequently some \$50,000 more—about \$300,000 in all. The road thus built on the location of the Midland Company, under its charter and with its money, must be regarded as its property. As to any land taken by condemnation under the charter of the Connecting Company and paid for with money of that company, it must be regarded in the same light as that of a land owner would which has been taken for a railroad, and of which, by permission, the company is in possession, but which has not been paid for. *Morris & Essex R. R. Co. v. Blair, ubi supra.*

It is entirely undeniable that, but for the difficulty which was encountered by the Midland Company in condemning certain land necessary for the construction of the road, the road would have been built without any action whatever on the part of the Connecting Company, or any aid from it. It is equally undeniable that the Midland Company never resigned the enterprise to the Connecting Company, but, on the contrary, it was at all times regarded as the road of the Midland Company, and the condemnations of land made under the charter of the Connecting Company were made

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for the Midland Company. The Connecting Company merely lent its charter powers of condemnation to the latter to be used if and when necessary to effectuate the purpose of the latter, in the execution of which it then was, and for a considerable length of time had been, engaged—the construction of its railroad from Bellman's creek to West End. That was the end and aim of the project of using the Connecting Company's charter, and the sum and substance of the whole matter.

It is true the Connecting Company appears to have made two agreements in regard to the railroad in question in this suit, one in April, 1872, and the other in October following. Both were made with the Delaware, Lackawanna and Western, and Morris and Essex Railroad Companies. The first of these provided a crossing for the road in dispute over the old Morris and Essex Railroad, and the other provided a crossing for the Montclair Branch over that road. By the latter, the Connecting Company agreed with the other parties to the agreement, in consideration of those rights of crossing, to give them the right of crossing for their roads (the Morris and Essex and Boonton Branch) over the road in dispute. As to the first agreement, which is in reference to the road in dispute, it was made at the time when (for the purpose, and only for the purpose, of condemning land for the Midland Company) that company was using the charter power of the Connecting Company. The circumstance that the agreements were made in the name of the latter company, cannot countervail the evidence that the road in dispute was, in fact, not its property, but the property of the Midland Company.

The fact that the Midland Company gave to the Connecting Company, in 1873, a deed of conveyance for that part of the road which was covered by the mortgage given by the latter, taking in return, in July, 1874, a lease from the Connecting Company for it, of course will not affect the rights of the complainants and the other mortgagees of the Midland Company. The Midland Company could not, by

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the conveyance, divest or affect the prior rights of its prior mortgagees. Nor will the fact that the Midland Company obtained money on the bonds of the Connecting Company (Judge Low says it obtained about \$100,000 thereon), avail to give the Connecting Company a lien upon the road in question. If the money received by the Midland Company from the Connecting Company was used to pay interest on the mortgages of the Midland Company, that will not give a lien for it. If it went to supply the place in the treasury of money paid for land for, and for the construction of, the road in dispute, that fact will not of itself, of course, give any lien. If used to pay the purchase-money of land bought by the Midland Company for the road the title whereof was taken by the latter, the fact that it was so used will give no lien.

Those who took the bonds of the Connecting Company, had constructive notice of the fact that the Midland Company had a prior location as to all the road except the part included in the location of June, 1871, and, as to that, that it was building its road upon it. Inquiry would have apprised them of the fact that the Connecting Company had abandoned that location in favor of the Midland Company. They had constructive notice that the title to by far the greater part of the land for the road was held by the Midland Company, and not by the Connecting Company, and that the mortgages of the Midland Company in general terms covered the road. The Midland Company not only built the road, but remained in possession, afterwards acknowledging no title of the Connecting Company, until October 16th, 1873, when the deed of conveyance was given.

The Connecting Company's mortgage appears to have been used by the management of the New Jersey Midland, the Montclair and New York, and Oswego Midland Companies as a means of raising money. To give the bonds credit they were guaranteed by all three of the companies.

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When sold they sold at a very low price, from the fact that they were a doubtful security.

Since this suit was begun, parts of the land purchased by the Midland Company for the road from Bellman's creek to West End, have been sold under foreclosure of mortgage thereon, and, by direction of this court, the property has been bought in by the receivers. The amount paid by them therefor is about \$30,000. The fact that the title has been thus changed would not affect the rights of the parties litigant in the controversy between the mortgagees of the Midland Company and the mortgagee of the Connecting Company, but the court would order a conveyance of the property to the party entitled to it, on proper terms.

In the year 1872, and prior thereto, the Delaware, Lackawanna and Western Railroad Company, as lessee of the Morris and Essex Railroad Company, ran its trains through Hudson county on what is now the old line of the Morris and Essex Railroad, passing thence through the Erie tunnel and under the Midland road at a point south of the Long Dock Company's land. It then contemplated the construction of a tunnel of its own through Bergen Hill, and had made surveys for that purpose, and had projected a route to reach the tunnel. This route would cross the road occupied by the Midland Company at a point south of the Erie crossing. In April, 1872, an agreement was made, in the name of the Connecting Company, with the Delaware, Lackawanna and Western, and Morris and Essex Companies, that the Midland road should be permitted to cross the Morris and Essex road, and the crossing was made accordingly. Subsequently, the Montclair Company and the Connecting Company, having constructed a road from the road of the Midland Company to Penhorn creek, wished to cross the then existing line of the Morris and Essex Railroad Company.

An agreement was made between the Connecting Company of the one part, and the Delaware, Lackawanna and Western, and the Morris and Essex Companies of the other

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dated October 16th, 1872, by which the Connecting Company, in consideration of the grant of the before-mentioned right to cross the Morris and Essex Railroad and the right to cross with the Montclair Branch, agreed to allow the Delaware, Lackawanna and Western Company to cross its line. It appears that, subsequently, the Delaware, Lackawanna and Western Company changed the position of its new tunnel and the line to reach it, so as to cross the railroad operated by the Midland Company, at two points, both being south of the old crossing of the Morris and Essex Railroad. When the Delaware, Lackawanna and Western Company had completed its tunnel, or nearly so, it was about to cross the road operated by the receivers of the Midland Company, and an injunction was obtained in the premises by the receivers, and orders were afterwards made by this court requiring the Delaware, Lackawanna and Western Company to raise the grade of the road in the possession of the receivers, at a point where the new crossings were to be made, and to make all other changes which would be necessary in consequence of the change of the grade on account of the crossing, which was not at grade. At the place where these crossings were made, the receivers had in possession and were occupying, as part of the railroad property, a piece of land about 1,800 feet long, for terminal purposes and as a drill-yard.

The order before mentioned recited that the chancellor was of the opinion that the order which had been made upon the petition of the receivers requiring the Delaware, Lackawanna and Western Company to refrain, until further order, from entering upon, interfering with or raising the tracks or grades mentioned in the petition, or otherwise trespassing upon the railroad tracks, yards or other property then in the possession of the receivers, should not be wholly discharged, and that it would not be just to that company to give judgment at that time upon the rights set forth in its answer to the petition, and that, before that was done, the company should be made a party to this suit and have the

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opportunity to litigate therein its rights to the crossing claimed in its answer to the petition, and whether they are subject and subordinate to the complainants' mortgage, and that, pending the proceedings to settle that question, the company should not be hindered or delayed in making or using the crossing, provided it should give sufficient security to pay such damages, including the value of the land taken, to be thereafter ascertained by this court, as might be sustained by the taking and occupation of the land with the proposed tracks and the proposed alterations, to be made as ordered by the court; and it was thereupon ordered that that company and its lessor be, and they were thereby, made parties to this suit, and that the complainants' bill be amended for that purpose, and that the two new defendants answer it and file a cross-bill, if they should elect so to do. And, in the meantime, and until further ordered, the order, except as modified, was to continue in force.

And it was thereupon further ordered and directed that the Delaware, Lackawanna and Western and the Morristown and Essex Companies (on filing with the clerk of this court a bond to the chancellor in the sum of \$150,000, with condition that they, or one of them, should and would, pursuant to the order of this court in that behalf to be made, pay to the complainants or the receivers, whichever the court should order, such sum or sums of money, if any, as the court should name, order, and direct as the value of the land included in the mortgage of the complainants which should be taken by the two companies last named, or either of them, for the construction and maintenance of the two crossings, and as the amount of any damages which the owners of the railroad described in and mortgaged by the complainants' mortgage would sustain by reason of the taking and use of the lands for the crossings, the value of the lands, and the amount of damage, including any impairment of the yard, if any, to be ascertained by this court) and, also, that the two companies last named, or one

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them, should and would obey, perform and fulfill such order or orders as the chancellor should, from time to time, make as to the raising the grade of the railroad in the possession of the receivers, so as to make the grade thereof properly conform to the grade of the crossings) might, at their own expense, proceed to put in, and, when put in, to use, the two crossings, and to raise the grade of the railroad in the possession of the receivers on each side of each of the crossings, and the appurtenant tracks, if necessary, belonging to the plant; that is, from the southerly side or edge of the bridge from the old main line of the Morris and Essex Railroad to a point southerly of the designated point of said crossings; but, while putting in the crossing and raising the grade, the Delaware, Lackawanna and Western Company, and its lessor, and those acting under them, or either of them, should not interrupt, obstruct, delay, or inconvenience the business carried on on the railroad in the possession of the receivers, more than reasonably necessary in order to put in the crossings and raise the grade; and to the end that the grade might be raised with the least interruption, obstruction, delay and inconvenience practicable, it was provided that the Delaware, Lackawanna and Western Company and its lessor might, at their own expense, employ the receivers, or one of them, to do the work of raising the grade, and that the receivers, or either of them, might be employed for that purpose; they or he, so employed, rendering to this court, whenever required so to do, full and true accounts of all money or other valuable thing by them or him received and disbursed for or on account of or by reason of the work.

The order also provided that the court would, as soon as practicable, ascertain and direct what other and further raising of the grade of the railroad in the possession of the receivers should be done, by or at the expense of the Delaware, Lackawanna and Western Company or its lessor, and that, thereupon, those companies, or one of them, should forthwith, at its or their own expense, proceed with and

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promptly complete such other and further raising of the grade as should be ordered; and, until the court should make such order as it should deem proper, as to other and further raising of the grade, the Delaware, Lackawanna and Western Company and its lessor should not use the crossings, or either of them, except the most southerly or which they might use for construction purposes, as therefore, under reasonable arrangements with the receivers; and upon failure to do so, the condition of the bond should be broken, and the Delaware, Lackawanna and Western Company and its lessor, and each of them, and each of their successors and assigns, should thereupon be absolutely enjoined from using the crossings until such other and further raising of the grade should be completed, according to the order of this court; and all other matters, including the question as to the mode of the use of the crossings, and right of precedence of trains, were reserved for further consideration and determination. And it was declared that nothing in that order contained should be construed as taking the property, or any part thereof, out of the possession of this court.

By a subsequent order, made on the 25th of April, 1877, it was further recited that it appeared to the chancellor by a report of the receivers, that they and the Delaware Lackawanna and Western Company and its lessor had (subject to the approval and confirmation of the chancellor) agreed upon the other and further raising of the grade of the railroad in the possession of the receivers, which should be done by or at the expense of the Delaware, Lackawanna and Western Company and its lessor, and had also agreed upon what they regarded as a reasonable and sufficient provision for the transaction of the business to be done on that part of the road in the possession of the receivers, affected by the two crossings, and it was ordered that the provision for the further raising of the grade of the railroad in the possession of the receivers was sufficient and all that needed in that behalf, be required of the Delaware, Lackawanna

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and Western and Morris and Essex Railroad Companies, and that the work should be forthwith completed, and that the receivers might be employed to do it, and thereupon rules and regulations were established for the running of the trains.


By the agreement of October, 1872, already referred to, between the Connecting Company and the Delaware, Lackawanna and Western Company and its lessor, the right was granted to the Connecting Company to construct, over the Morris and Essex Railroad, a railroad bridge (for the Montclair road) of a certain description, to carry its road over the Morris and Essex road; and, in consideration thereof, it was agreed between the parties that, if the Delaware, Lackawanna and Western Company, or its lessor, should desire to change the line and grade of the main line of the Morris and Essex road, or of the Boonton Branch, or of both, so as to make it necessary to cross the railway of the Connecting Company, which, under that agreement, was to be constructed over the Morris and Essex road, or the railway which, under the agreement of April 3d, 1872, had been constructed by that company over the Morris and Essex road, or over both of those railways, the Delaware, Lackawanna and Western Company and its lessor, or either of them, should have the right, without charge, to cross either or both of those railways of the Connecting Company over, under or at grade, and might occupy and use, without charge, so much of the lands of the Connecting Company as might be necessary for that purpose. And if, in making such crossing or crossings, it should be necessary, in order to meet the reasonable requirements of the Delaware, Lackawanna and Western Company and its lessor, or either of them, to modify, change or alter the grades and elevations of the railways of the Connecting Company, or either of them, and the parties could not agree upon such modification, change or alteration, then it was to be referred to the chief engineer (for the time being) of the Philadelphia and Reading Railroad Company, to

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decide and determine, upon a consideration of the fact circumstances, what modification, change or alteration should be made by the Connecting Company in the grades and elevations of its railways in order to meet the requirements of the other companies; and it was thereby decided to be understood to be the intention and purpose of the last-mentioned companies to change the lines and grades of the main lines of the Morris and Essex and Boonton Branch Railroads, with a view to passing through Bergen County otherwise than by way of the then existing Bergen tunnel and that, in thus changing the lines and grades of the Morris and Essex and Boonton Branch Railroads, they intended to cross over the Erie Railway by a bridge of the proper height, and that it was in view of those intentions and purposes that that agreement in reference to the crossing of the railways of the Connecting Company, and in reference to the changing of the grades and elevations thereof, was made; and that, in case of a reference, by way of arbitration, the fact that such intention and purpose were understood and agreed to exist was to be taken into consideration by the arbitrator or referee, and that his decision should be final and conclusive. And it was provided that all the covenants and agreements contained in the instrument should inure to the benefit of, and be binding on the successors and assigns of the parties respectively.

The land of the yard was the property of the Midland Company previously to the making of the deed of 1873; the legal title was in that company.

After what has been said, it need not be remarked that the agreement is not binding on the mortgagees of the land Company, except so far as the grant of an equitable interest for the grant of a crossing for the Midland road is concerned. To that extent they should be bound by equity, or, if not, should be required to return the consideration received by the Midland Company, or an equivalent therefor.



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At this point it will be convenient to dispose of certain questions which were raised on the hearing in connection with this agreement. Almost all of them, however, in view of the conclusion which I have reached in regard to the lien of the Connecting Company mortgage, have ceased to have any importance in the decision of this cause.

One of the questions was whether the Connecting Company's mortgage was properly proved, inasmuch as the proof was not made by the subscribing witness. The act respecting conveyances (*Rev. p. 153 § 4*) provides that a deed or conveyance of lands shall be acknowledged or proved according to law, to entitle it to be recorded, and mortgages are to be acknowledged or proved in like manner (*Rev. p. 706 § 20*). Proof is to be made by one or more of the subscribing witnesses. The Connecting Company's mortgage was executed under the common seal and signed by Julius H. Pratt, president, and Henry R. Low, treasurer. The subscribing witness was Theodore R. Shear. The proof was made on the 23d of February, 1872, by Josiah T. Wilcox, then secretary of the company, as to the execution of the company, and on the same day proof was made of the execution by the trustee (James P. Wallace), by Mr. Shear.

The proof of the execution by the company not having been made by the subscribing witness, is not in accordance with the provisions of the law, and did not authorize the recording of the instrument. It is urged, however, that, inasmuch as Mr. Wilcox signed, with Mr. Shear, the certificate of proof which was sworn to by them, and which is attached to the mortgage, and follows it, and refers to that instrument as the "foregoing instrument," the signature thus subscribed to the certificate may be regarded as the signature of the subscribing witness. But Mr. Wilcox was not a subscribing witness to the instrument, and, to comply with the provisions of the statute, the proof should and could only have been made by either Mr. Shear, Mr. Pratt or Mr. Low. To hold that the signature of Mr. Wilcox, under the

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out returning the compensation which was the grant of crossing for its road over the old Morris and Essex road. The tunnel was constructed before the eyes of the public, and there was no notice whatever that the company claimed the right to cross the tracks of the Midland Railroad without giving compensation. There was nothing inconsistent in the idea of compensation in the construction of the tunnel. The fact that a railroad has been constructed, at great expense and with whatever difficulty, up to the line of my land, while it may be evidence to me that the company intends to take my land for the purposes of its road, does not surely not estop me from demanding and insisting on compensation. There is no estoppel by acquiescence in this case.

But if the agreement were valid against the mortgagees of the Midland Company, it would not be so to the extent intended by the Delaware, Lackawanna and Western Company. At most, it contemplated, according to its terms, the right to cross, without charge, either or both of the railways then referred to as the railways of the Connecting Company, over, under and at grade, and to use and occupy, without charge, so much of the lands of that company as might be necessary for that purpose. It was an exchange of rights to cross, presumably similar and mutually compensatory, each the equivalent of the other, or nearly so. But, whether so or not, it cannot be doubted that the Connecting Company did not contemplate, in the grant, the consequences which will necessarily follow the construction put upon the agreement by the other party to the agreement. It was a meeting of the railroads that was contemplated, and only

The occupation of the drilling-yard, and the partial destruction of its value and usefulness, and the very great injury done by that crossing, were certainly not within contemplation of that company; nor (it may be safely assumed) within that of the other companies.

It is in evidence that the Delaware, Lackawanna and Western Company, early in the year 1872, had, as before

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stated, projected a route to reach its new tunnel, which would have crossed the Midland Company's road at a point a little south of the Erie crossing, and a considerable distance away from the drill-yard, and where it would not have materially interfered with the operation of the road, or have done any more damage than would have been compensated for, or nearly so, by the crossing granted to it. If the Delaware, Lackawanna and Western Company had come into this court for specific performance of the agreement (and that is, practically, its attitude before the court now, under the proceedings), it would have rested in the discretion of the court to have decreed specific performance, or not, according as equity demanded, and it would not have been considered in accordance with equity to decree a specific performance of a contract so unequal and unconscionable. This court would not have consented to be the means of inflicting, without adequate compensation, upon the resisting defendant the very great injury which the crossing which has been made has inflicted upon it. The fact that the Delaware, Lackawanna and Western Company and its lessors gave no consideration whatever, except the rights to cross, before mentioned, could not be left out of sight. Under the circumstances, in view of the great private and public injury which would have been occasioned by the refusal of the court to permit the Delaware, Lackawanna and Western Company to connect its road on the west with the tunnel, it was deemed proper to permit it to make the crossing on such terms as it appeared to the court would secure the rights of all for and until a proper and due adjudication thereon. In my judgment, that company should pay such damages, to be ascertained by this court, as will compensate for the injury done, over and above the mere right of crossing, without pay, the railroad of the Midland Company, if such crossing had been made at a place where it could have been made without injury to the yard, or the use thereof, or other injury than the mere crossing by one railroad of the tracks of another.

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Francis B. Wallace has been made a party to this suit with respect to his claim for compensation for land in the county of Sussex, sold by him to the Midland Railway Company and occupied by it with its railway. It appears that, on the 1st of July, 1870, he agreed to sell to the company, for its road, the land before referred to, with all the timber thereon, for the sum of \$2,572.73, but reserving to himself all the minerals on the property. The company agreed, as part of the consideration, to fence the land and keep the fence in repair. It took possession of the land and laid down its track upon it, and it has been used by it or the receivers ever since, the track being part of the main road. In October, 1874, the price being still unpaid, he demanded a settlement of the company, and it was then agreed between them that he would accept the company's promissory notes running through a period of fifteen months, for the price, with the understanding that, if the notes were paid at maturity, he would convey the land to the company, but, otherwise, he was at liberty to have recourse to legal remedies for the recovery of his property. The notes were never given, nor was the agreement signed, and the matter still rested in verbal understanding up to the time when the company became insolvent. Since the decree of insolvency, the road, including the property in question, has been in the possession of the receivers. The company has never obtained title to the land, and has never paid him the consideration money agreed to be paid, or any part of it. He has never received any security. He is entitled to his lien for the purchase-money.

It results from the foregoing opinion that, in the original suit, there will be a decree that the complainants are entitled to the relief which they seek by their bill, the foreclosure and sale of the mortgaged premises. Their mortgage will be decreed to be the first lien upon the premises, and to include the railroad from Bellman's creek to West End, and all the land purchased for use therewith, subject, however, to the payment of the money due, if anything, to the

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Hudson Connecting Railway Company, for the cost (with interest) of land condemned or otherwise acquired by the company for the road, the title whereof was taken by it and for which it has paid and has not been re-imbursed.

That the complainants' mortgage conveys all the estate which the mortgagors had in the mortgaged premises when the mortgage was made, or at any time afterwards.

That the chattel mortgage of Terhune and Olmstead is not a lien upon the property therein mentioned.

That the judgments of the answering judgment creditors on which execution was issued, are entitled to priority payment out of the mortgaged chattels on which levy might have been made, over the complainants' and the second and third mortgages.

That the plaintiffs in the Hennion judgment are entitled to a vendor's lien on the land for the value whereof the judgment was recovered.

That Francis B. Wallace is entitled to a vendor's lien on his land taken by the Midland Company.

That the relief which the employees seek cannot be accorded.

That the directors by whom advances were made in respect to the rolling stock, and for which advances they claim subrogation, are entitled to an equitable lien on the rolling stock for the advances, subject, of course, to the money due and to become due to the vendors of the stock.

That the Delaware, Lackawanna and Western, and Morris and Essex Railroad Companies are not, as against the encumbrancers of the Midland Company, entitled to specific performance of the agreement of October, 1872, made between the Hudson Connecting Railway Company with them, by which it will be required to pay to the mortgagees of the Midland Company, for the value of the land and damages, such as this court shall direct (allowing them the value of the crossing of the Midland road over the Morris and Essex road, under the agreement of April, 1872) for the la

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taken and damages in the crossing permitted by this court.

That the prayer of the bill of E. Ellery Anderson, trustee, &c., will, so far as the road covered by complainants' mortgage is concerned, be denied.

JAMES S. TAYLOR

v.

ARCHIBALD K. BROWN and others.

F., a creditor of B., brought suit on his demand. T., another creditor of B., put his claim in the hands of an attorney for collection. The attorney proposed to F. to obtain an assignment from B., to secure both claims, and F. assented thereto. Subsequently B. made a general assignment for the benefit of all his creditors, which, however, was never delivered.—*Held*, that F. was not thereby estopped from prosecuting his suit.

Bill for relief. On motion for injunction on bill and affidavits and depositions taken in another cause in this court, read by consent.

Mr. S. B. Ransom, for the motion.

Mr. Jacob Weart, contra.

THE CHANCELLOR.

The defendant, William M. Force, being a creditor of Archibald K. Brown, brought suit against him to recover his debt. The complainant, also a creditor of Mr. Brown, placed his claim in the hands of an attorney for collection. The latter proposed to obtain, if practicable, an assignment from the debtor of an interest he had in the estate of his deceased father-in-law, to secure the payment of the debts

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of his client and Mr. Force. Mr. Force was willing to accept that arrangement if it could be effected, provided it included the payment of his attorney's fees, and he appears to have said so. Though Mr. Brown executed an assignment of the interest, it was not for the benefit of Taylor or Force alone, but included in its provisions the claims of other creditors, also, to be paid ratably with theirs. Mr. Force never delivered the assignment. Mr. Force proceeded to judgment with his suit and took supplementary proceedings thereon at law, and filed a bill in this court to obtain satisfaction of his debt out of the before-mentioned interest. The complainant seeks to restrain him in those proceedings on the ground that, although Mr. Brown did not deliver the assignment, he executed it and promised to deliver it, and therefore, it should be regarded in equity as having been delivered at the time when he ought, according to his promise, to have delivered it, which was before Mr. Force obtained judgment. But Mr. Force does not appear to have done or said anything which makes it inequitable for him to proceed to collect his debt by the means which he has taken. He does not appear to have gained his advantage by inequitable conduct or methods, but, on the other hand, seems to have acted fairly in all respects.

The motion will be denied, with costs.

JOSEPH PARKER and ELIZABETH A., his wife,

v.

EDWARD SNYDER and LYDIA W., his wife.

To establish a trust resulting from the payment of purchase-money the proof must, where the trust and the grounds of it are denied, be clear, and the case made by the proof must be substantially the same as that made by the bill.

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Bill for relief. On final hearing on pleadings and proofs.

Mr. A. C. Scovel, and *Mr. W. W. Wiltbank* of Philadelphia, for complainants.

Mr. A. Flanders, for defendants.

THE CHANCELLOR.

The complainants, by their bill, seek to restrain the further prosecution of a suit (an action of *assumpsit*) brought by the defendant, Lydia W. Snyder, against the complainant, Elizabeth A. Parker, in the supreme court of this state, to recover \$8,450, with interest, being the amount, in the aggregate, of the sums of money mentioned in four deeds from the defendants to Mrs. Parker, as the consideration of the conveyance of land thereby made to her. They also pray an account of the dealings and transactions between Mrs. Parker and Mr. Snyder, in relation to the building of four houses on the lots of land described in those deeds respectively, the bill alleging that those houses were built by him for Mrs. Parker, and that the land whereon they were erected was held by Mrs. Snyder to the use of Mrs. Parker, and for the purpose of building the houses thereon for the latter by Mr. Snyder. They also pray a conveyance by the defendants, to Mrs. Parker, of another lot of land described in the deed, and therein alleged to be held by Mrs. Snyder in trust for Mrs. Parker.

The bill alleges, in substance, that, on the 9th of October, 1875, the complainant, Joseph Parker, was the owner of an unimproved lot of land in the city of Beverly, in this state, having a frontage of about four hundred and thirty-six feet, which he valued at \$1,200; that his wife was desirous of acquiring it for her separate estate, with a view to improving the property by the erection thereon of a number of houses, to be paid for out of her separate estate, and that she bought the property, and, with the consent of her husband, employed Mr. Snyder to erect buildings thereon, for

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her and at her expense, he acting merely as her agent in the premises, for compensation to be paid by her to him, and that, to carry out her design, she proposed that her husband should convey the land to Mr. Snyder, but, at the request of the latter, she caused it to be conveyed to his wife.

The bill states that it was understood and agreed that Mrs. Parker was to entrust to Mr. Snyder \$1,200 in money of her own estate, with which he was forthwith to pay to her husband the consideration (\$1,200) of the conveyance of the land; that, on the 11th of October, 1875, she entrusted to him \$1,200 of her own money accordingly, and he delivered it to her husband, and, in consideration thereof, the latter (she joining him in the deed, as his wife) duly conveyed the lot to Mrs. Snyder; that Mr. Snyder in the pretended execution of his agreement with her, as her agent and at her direction, built four houses on part of the lot; and that, on the completion thereof, but before the settlement or exhibition of his accounts, he and his wife, by the deeds before mentioned, conveyed the land upon which the houses were built, being part of the tract conveyed to Mrs. Snyder by the complainants as before mentioned, to Mrs. Parker. It further states that, on the 8th of November, 1876, Snyder directed a note (it appears to have been an order) to Mrs. Parker, requesting her to pay William E. Scudder & Co., merchants, doing business in Camden, \$1,224.71, which, he represented to her, was due to them for materials furnished by them, on her account, to him, for the buildings; and that she agreed to pay them the amount of the order.

The bill alleges that the consideration moneys mentioned in the four deeds for the lots upon which the houses were built, were merely nominal, and were sums which were fixed upon as the entire cost of the premises to her, but not as a price agreed to be paid by her for the property.

The complainants allege, as an additional grievance, that Mrs. Parker is liable for the amount of the order before

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mentioned, while, at the same time, the Snyders are prosecuting her for the full consideration money mentioned in the deeds.

On the other hand, the defendants, while they admit the conveyance by the Parkers to Mrs. Snyder, by the deed before mentioned, absolutely deny the trust, and allege that the money with which the land was purchased, was not the property of Mrs. Parker, but allege that the land was purchased by Mrs. Snyder for her own account, and was to be paid for, pursuant to an agreement between her and Mrs. Parker, with money due from the latter to her, part of the price (\$4,500) which Mrs. Parker agreed to pay Mrs. Snyder as the consideration of the conveyance of another house and lot, in the neighborhood of and adjoining the four houses before mentioned, sold by the latter to her before the purchase of the land in question in this suit.

The answer states, also, certain previous transactions between these parties as to which the bill is silent. It alleges that, in the early part of the year 1873, more than two years before the conveyance by the complainants to Mrs. Snyder mentioned in the bill, Mrs. Snyder came to Beverly in search of a building lot, on which to erect a house for a home for her and her husband, intending to invest therein, or in a building thereon, money which she had received from the sale of certain real estate in Camden belonging to her husband; that she was directed to Mrs. Parker as a person having building lots to sell; that she called on the latter accordingly, and stated her object, and, shortly afterwards, Mrs. Parker called upon her, in Camden, for the purpose of inducing her to purchase some of her lots; that Mrs. Snyder then agreed to buy, and did buy, from Mrs. Parker a lot which was then part of a tract of which the land conveyed by the complainants to Mrs. Snyder, in October, 1875, was the residue; that, for part of the purchase-money of the property which Mrs. Snyder so bought in 1873, two mortgages, dated September 1st, 1873, were given by her and her husband, one to Mrs. Parker,

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and the other to her husband, it being claimed that each had an interest in the property, and Mrs. Snyder the balance of the consideration in money; that, immediately after the purchase, Mrs. Snyder built a dwelling-house on part of the land, entirely with her own money, without any aid whatever from, or understanding of Mrs. Parker in respect to the property or building; subsequently, she sold the house and lot to Mrs. Parker, taking, as \$250 of the consideration, an adjoining lot of land, which, subsequently, was conveyed accordingly to Mr. Parker to her. Out of the balance of the purchase-money Mrs. Parker was to pay off the mortgages (the mortgages before mentioned and another) upon the property, and the rest of the consideration was to remain in the hands of Mrs. Parker for her convenience, and was to be paid by her, from time to time, as she might be required by Mrs. Snyder to pay it—the latter not having immediately for the money, but proposing to use it in building another house on the lot last mentioned; that Mrs. Snyder built a house upon that lot, and subsequently sold and conveyed the property to Mrs. Parker; that, at the time of the purchase of the second house and lot, Mrs. Snyder agreed to purchase an adjoining lot of about sixty feet front, for a consideration of \$540, which Mrs. Parker was to pay out of the purchase-money of the last-mentioned house and lot; that that lot was conveyed to her accordingly, and she thereon built a house, called, in the testimony, the “double house,” which, after it was completed, she sold to Mr. Parker for \$4,500, of which money \$1,200 were to be paid by Mrs. Parker to her husband, for the lot of land mentioned in the bill conveyed in October, 1875, by the plaintiffs to Mrs. Snyder.

The answer further admits that the order before mentioned, in favor of William C. Scudder & Co., ought to be computed and allowed to Mrs. Parker, if paid as part of the \$4,500. It denies the entire equity of the bill except the order in favor of William C. Scudder & Co., alle

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that the purchase-money of the property in question and cost of building the houses was furnished, not by Mrs. Parker, but by Mrs. Snyder, and denying that the defendants, or either of them, was the agent or trustee of Mrs. Parker in any way whatever.

The conveyance of October 11th, 1875, by the Parkers to Mrs. Snyder, was an absolute conveyance, in fee-simple, for the consideration of \$1,200 therein expressed. No trust is declared in the deed, nor is any evidenced by any writing. The complainants claim that a trust resulted to Mrs. Parker from the fact that, as they allege, she paid the purchase-money. To establish a trust resulting from the payment of purchase-money under such circumstances, the proof must, where the trust and the grounds of it are denied, be clear. *Groves v. Groves*, 3 Y. & J. 163. And the case made by the proof must be substantially the same as that which is made by the bill. *Andrews v. Farnham*, 2 Stock. 91.

By her affidavit annexed to the bill, Mrs. Parker swears that the consideration of the deed of October 11th, 1875, was paid by Mr. Snyder with her money, which, on that day, she entrusted to him for the purpose, and that he, as her agent, delivered that money to her husband accordingly, who forthwith executed and delivered to Mrs. Snyder the deed for the property. Such, too, is the statement of the bill. Her testimony, however, does not sustain this allegation, for she testifies that she herself paid in person to her husband the \$1,200 for the lot, in twelve \$100 notes. She says the circumstances of the case were, that she wanted the property and bought it, and that her husband could not convey it directly to her; that he conveyed it to Mrs. Snyder, and that she (Mrs. Parker) paid the money for the lot to her husband herself, and that neither Mr. or Mrs. Snyder was present at the time, though they knew she was going to pay the money. She adds that she had the money at their house on an occasion when she came up from Philadelphia and stopped there, as was her custom, and they saw it. When inquired of as to what she said, she answered

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that Mrs. Snyder made the remark that it was a strange thing for a wife to pay her husband for ground. It will be perceived that her testimony as to the payment of the consideration of the deed is in contrariety to the statement of the bill and the affidavit annexed thereto. Nor does she offer any excuse for this manifest and important inconsistency, and there does not appear to be any. And it is all the more noteworthy because of the fact that she, in her bill, ignores all the previous transactions between her and Mrs. Snyder. It should be observed in this connection that her husband was not sworn as a witness. Both Mr. and Mrs. Snyder positively and explicitly contradict her *in toto* in the statements in her bill and testimony in reference to the payment of the consideration of the deed.

Nor is there any evidence to sustain either of her statements on the subject of the payment of the consideration. On the other hand, the evidence sustains the allegation of the answer on that head, that the consideration of the deed of October 11th, 1875, was allowed to Mrs. Parker in the settlement for the price of the double house and lot, and that she agreed to pay it for Mrs. Snyder accordingly. Mrs. Parker swears, indeed, that the consideration of the double house and lot (\$4,500) was paid by her in full, and she produces an account rendered by Mrs. Snyder to her of payments made by her on account of that property. The first item in this statement is the sum of \$3,905.33 cash. It appears by the account in the book of Mrs. Snyder, from which this account was taken, that in that amount were included a demand in favor of William C. Scudder & Co., and \$1,200 for the price of the lot conveyed in October, 1875. Mrs. Parker says that she was present when that account was made, but does not remember what papers they had before them, except the paper containing the account delivered to her. She adds that it is very likely that Mrs. Snyder had her account-book with her at the time. She swears, however, that she never saw the book, nor any account which Mrs. Snyder had. The latter swears that

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ot only did Mrs. Parker see the account in the book, but he proves Mrs. Parker's acquaintance with the book by showing some figures (\$1,283.50) made by her in one of the accounts in it, and, when inquired of as to those figures, whether they were hers or not, Mrs. Parker does not deny them. She professes to be entirely unable to state how the \$3,905.33 was paid. She says: "I can't tell, to save my life, now, how it was made up; all I had was the statement exhibited, and all I know of the settlement is what was on that." To the question, "Did you keep any account of the moneys you paid to the Snyders on the \$4,500 house?" she replied: "I don't think I did," and she adds that the settlement was made a few days after she received the deed for the double house and lot, which was, she says, on or about the time it bears date, July 22d, 1875, and that the settlement was made before she purchased the \$1,200 lot of Mr. Parker, which, she says, was about the time the deed for it bears date, the 11th of October, 1875.

On the other hand, the defendants testify that the settlement for the double house was not made until the 3d of April, 1876. There is corroboration of their testimony in the fact that Mrs. Parker produces a receipt, drawn by her and signed by Mrs. Snyder, dated April 3d, 1876, acknowledging the receipt of \$4,500, in full settlement of the price of the double house, and in full of all demands up to that date. Mrs. Snyder swears that the receipt was given at the time of the settlement. Mrs. Parker, indeed, swears that it was not given until long afterwards; but the preponderance of evidence is in corroboration of Mrs. Snyder's statement. She says that the \$3,905.33 included a demand of William C. Scudder & Co. against Snyder, for \$1,606.13, which Mrs. Parker was to pay for her. It is evident, from the testimony, that she is right. It is proved that Mrs. Parker paid that amount, in full of Snyder's account with that firm to date, on the 6th of October, 1875, about two months after the date of the conveyance of the double house and lot to her. Mrs. Parker says she thinks this

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money was not paid on account of the price of the double house and lot; but she is evidently in error on that point. According to her statement, she paid the price of the land bought in October, 1875, after she received the deed for the double-house property, which, as before stated, was in July, 1875. It seems to have been allowed to her in the settlement of the purchase-money of the double house and lot. There is other evidence, also, besides that before referred to, that she is mistaken as to the time when the settlement was made.

In the effort to establish the trust upon which the equity of the bill is founded, the burden is upon the complainants, and, in this connection, it is impossible to overlook the variance between the allegations of the bill and the testimony of Mrs. Parker. While, on the one hand, the complainants produce witnesses to testify to expressions made use of by the defendants, tending to the recognition of the proprietorship of Mrs. Parker in the houses, while they were being built, and produce proof of contributions of materials &c. to the buildings by her, that evidence is by means irreconcilable, under the circumstances, with the claim of ownership made by Mrs. Snyder. On the other hand, the defendants prove that Mrs. Parker stated that Mr. Snyder had bought the land from her (Mrs. Parker's husband; also, that she expressed herself as undecided whether to purchase the houses which the Snyders were building; also, that, after the purchase of some of the houses, she threatened to "throw up the purchase"; that she expressed regret that she had taken the houses, and that she and her husband sought, by application to the municipal authorities of Beverly, to escape from paying the tax which, in 1875, was assessed against her for the property conveyed in October, 1875, to Mrs. Snyder, on the ground that neither Mr. nor Mrs. Parker owned the property, but failed, because the tax was imposed before the conveyance to Mrs. Snyder.

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I deem it unnecessary to discuss the testimony at greater length. It seems evident that, in the beginning of the transactions between these parties, the Snyders invested their money in a house and lot, wholly on their own account, the title to the property being taken by the wife; that that property was then sold to Mrs. Parker, who, in the purchase, found the opportunity for selling another lot to them, to be improved by them, and so on through the transactions, until the last purchase. It was advantageous to the Snyders to give to Mrs. Parker easy terms of payment, for they were thus enabled to sell their property. And those terms were, obviously, advantageous to Mrs. Parker. They gave her an opportunity to find a purchaser for the property before she would be required to pay for it. Besides, in the transactions, she was exchanging, in part payment for improved property, her or her husband's unimproved property. In her bill, Mrs. Parker leaves out of sight all these transactions prior to the conveyance of October, 1875, and deals with that as if it were the only one, and had no connection with the former ones. The connection between them, however, is very significant. It seems clear that Mrs. Snyder was understood, between them, to be the purchaser of the lots as and when they were conveyed to her; and that the buildings erected thereon were erected by her or by her husband, on her or his account, and not on account of Mrs. Parker; and that Mrs. Parker was, and considered herself to be, entirely at liberty to purchase the houses and lots or not, just as she saw fit. She is entitled to no relief. Her bill will, therefore, be dismissed, with costs.

Harris v. Johnson.

JAMES D. HARRIS

v.

JOHN H. JOHNSON and others.

A conveyance of "all that free use of the undivided half part of wagon-way extending one hundred feet along the said John H. Johnson's line, from the public highway; the said wagon-way to be used only for passing in and out at all proper times, but without unnecessary delay or obstruction to the said passage-way, thereby causing annoyance and damage to the said John H. Johnson, his heirs assigns," with an *habendum* to the grantee, his heirs and assigns, to and their only proper use, benefit and behoof forever, and with usual covenants of warranty, conveys only a right of way or easement.

Bill for relief. On final hearing on pleadings and pro

Mr. G. O. Vanderbilt and *Mr. J. H. Stewart*, for complainant.

Mr. J. F. Hageman, for defendants.

THE CHANCELLOR.

On or about the 18th of October, 1875, an agreement in writing, was made between the complainant and the defendants Maria Johnson and David C. Johnson, her husband, for the sale and conveyance by them to him, for the consideration of \$1,600, of a lot of land in the village of Kington, in the county of Somerset, reserving thereout, in words of the agreement, "the right of a wagon-way to the said John H. Johnson and his heirs and assigns, to the distance of one hundred feet, along the line of the said John H. Johnson, from the public highway, to be used only for passing in and out at all proper times, but without any unnecessary delay or obstruction to the said passage-way, thereby causing any annoyance and damage to the said James D. Harris, his heirs or assigns." Subsequently, by deed de

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March 27th, 1876, and acknowledged and delivered on that day, Mr. and Mrs. Johnson conveyed the property to the complainant, in pursuance of the agreement. The deed contained a reservation of a right of wagon-way, exactly in accordance with the provision of the agreement in that respect. By deed dated the 25th of the same month, but not acknowledged or delivered until the 27th, Mrs. Johnson (her husband joining in the deed), for the consideration of \$200, "granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed" the right of way to John H. Johnson (son of David C. and Maria Johnson), his heirs and assigns forever, by the following description:

"All that free use of the undivided half part of the wagon-way extending one hundred feet along the said John H. Johnson's line, from the public highway; the said wagon-way is eight feet six inches between the two houses, and ten feet at the north end; the said wagon-way to be used only for passing in and out at all proper times, but without unnecessary delay or obstruction to the said passage-way, thereby causing annoyance and damage to the said John H. Johnson, his heirs or assigns."

That deed contained an *habendum* to the grantee, his heirs and assigns, to his and their only proper use, benefit and behoof forever, and it contained the usual full covenants applicable to the conveyance of land, the scrivener having used for the conveyance a printed blank of a deed of land. The complainant being advised and apprehending that this latter deed, which is of prior date to his, and has been recorded while his has not, conveys more than the right of way, viz., the fee in the land over which the right of way is given, files his bill to remove the supposed cloud.

There is no evidence of any design on the part of the Johnsons, his grantors, to overreach the complainant or in any way to defraud or prejudice him or becloud his title, or to do anything more than assure the right of way to John H. Johnson and his heirs and assigns. On the contrary, they appear to have been, up to the time when legal proceedings were threatened, willing and even anxious to

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correct any mistake which might have been made by scrivener in the conveyance of the right of way, and H. Johnson would, undoubtedly, on proper application before this suit was brought, have willingly executed instrument deemed proper to quiet the complainant's apprehensions. The fears of the complainant, however, groundless and he has no claim to relief. The deed John H. Johnson obviously was intended merely to set to the latter the right of way reserved in the deed to complainant, and it, in fact, does nothing more. 2 *Washb. on R. P.* (4th ed.) 300; *Codman v. Evans*, 1 *Allen*. *Jamaica Pond Aq. Corp. v. Chandler*, 9 *Allen* 159, *Washb. on Easements* 37, 39; *Homes v. Richards*, 2 *Call.* *Leavitt v. Towle*, 8 *N. H.* 97; *Graves v. Amoskeag Co.* *N. H.* 462.

The bill will be dismissed, with costs.

ELIZABETH A. VAN DYKE

v.

FRANK VAN DYKE and others.

1. Where an administrator, party to a foreclosure suit for sale of the land of his intestate, after request by the creditors, refuses to apply to have the sale set aside, a creditor, on behalf of himself and other creditors, may obtain relief on petition. He may be permitted to intervene in the name of the administrator, on such terms, if any, as the court may see fit to impose for the indemnity of the latter, if occasion require, in his own name.

2. Sale set aside on the ground of gross inadequacy of price, or with fraudulent conduct on the part of the purchaser in preventing competition.

Motion on petition to set aside sheriff's sale of mortgaged premises under *fieri facias* issued out of this court.

Van Dyke v. Van Dyke.

Mr. G. O. Vanderbilt and Mr. J. T. Bird, for petitioner.

Mr. W. J. Gibby, for respondent.

THE CHANCELLOR.

Elizabeth A. Van Dyke, the complainant in this suit, obtained a final decree for the sale of certain mortgaged premises, being a farm of which her husband died seized, in the county of Mercer, to raise and pay to her the sum of \$5,928.02, besides interest and costs. The premises were sold, under the execution, on or about the 14th of February, 1878, by the sheriff, to her, for the sum of \$1,100, and he afterwards conveyed the premises to her accordingly. They were sold subject to a prior mortgage of \$5,000 principal, whereon there was due, at the time of the sale, about \$300, for interest. The petitioner is one of the creditors of the estate of William Van Dyke, deceased. Mr. Van Dyke's property consisted of the mortgaged premises and about \$2,000 of personal property. He died in May, 1877, intestate, and James B. Coleman was appointed his administrator. The administrator is a party to this suit.

The estate is still unsettled. The complainant has put in her claim against the estate for the amount due on the bond secured by her mortgage, after crediting the amount raised by the sale of the mortgaged premises. If the sheriff's sale be permitted to stand, the estate is insolvent. The petitioner alleges that the premises were sold at a grossly inadequate price, and that they would have brought a much larger sum of money but for the fraudulent contrivance of the complainant to prevent bidding on the part of the creditors of the estate, both by stating, publicly, that she intended to take the mortgaged premises at the sale in satisfaction of the mortgage, and by inducing one person who, otherwise, would have bid upon the property a large sum of money, to refrain from bidding, upon the promise by her to him that, if he would do so, she would pay his debt; he being a creditor of her husband's estate.

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The petitioner alleges that, after the sale, he applied the administrator to take action with a view to setting aside the sale upon the grounds before mentioned, but the latter declined to do so, alleging, as an excuse, his old age and physical infirmities, and an indisposition to have anything to do with the matter.

The respondent insists that the petitioner has no standing in this suit, and cannot be heard upon this application, but that the application can only be made by the administrator. The administrator is the mere representative of the creditors and next of kin. In this case, the estate being insolvent if the sale stands, he practically represents the creditors alone. By refusing to take the action necessary for their protection in this suit, he leaves them without remedy unless they can be heard notwithstanding his refusal.

The petitioner prays that he may be admitted a party to the suit. That, however, is not necessary to the relief which he seeks. He appears in behalf of the creditors of the estate, and might be permitted to do so, under the circumstances, in the name of the administrator, the court imposing such terms, if any, as it might deem proper for the indemnity of the administrator in the premises. The creditors may avail themselves of the administrator's name and standing in the suit for their protection. *Receivers & v. Wortendyke*, 12 C. E. Gr. 658. And, if occasion require, may be permitted to intervene in their own names to protect their interests. *Calvert on Parties* 58; *Drew v. Harman* 5 Price 319; *Houlditch v. Marquis of Donegal*, 1 Sim. Stu. 491; *Story's Eq. Pl.* § 365; *Williamson v. N. J. Southern R. R. Co.*, 10 C. E. Gr. 13.

That the mortgaged premises were sold at a grossly inadequate price is entirely clear, from the evidence. They were struck off to the complainant at \$1,100, subject to the principal and interest (\$5,300) of the prior mortgage. They were reasonably worth from \$10,000 to \$11,000. As before stated, the sale took place on the 14th of February, 1871. On or about the 5th of April following, Enoch Perri

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offered the complainant \$10,000 for the premises, which she refused. He says he had made up his mind to give her \$10,500, if she would not take less. James English testifies that, about three weeks after the sale, he asked the complainant if she would take \$10,000 for the property, and she said that she would not, because it was worth more. He also says that, about a month before the sale took place, he asked her what she thought the mortgaged premises were worth, and she said that they ought to bring \$11,000. The petitioner testifies that he was confined to his house by sickness, and was, therefore, unable to attend the sale; but, if he had been present, he would have bid the property up to \$10,500, including therein the amount of the prior mortgage, and he swears that the premises are, at this time, worth that sum. Samuel E. Perrine fixes the value of the property about the time of the sale, at from \$10,000 to \$10,500. The complainant told him that she was unwilling to take \$10,500 for the farm, because, as he understood her, she thought she ought to be paid for the crops, also. John H. Coleman testifies that he was present at the sheriff's sale, and had some conversation with the complainant there, relative to bidding upon the property, and as to the amount which it ought to bring, and that the complainant said that, before she would let it be sold to go out of her possession, she would give \$10,000 for it. He says she requested him to bid for her, and told him that she did not want him to let the property be struck off, except on her bid, for less than \$10,000. John Wyckoff also testifies that the farm was worth about \$10,000.

The inadequacy of price, however, would not be, in itself, sufficient reason for setting aside the sale; but there is clear evidence of successful effort on the part of the complainant to prevent competition, in order that she might become the purchaser of the farm, at the sale, at a price less than its value, or than it would have otherwise brought.

The testimony of Enoch Perrine is clear and unequivocal. He testifies that he is the brother-in-law of the complain-

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ant; that he heard her repeatedly say, before the day sale, that she intended to bid the mortgaged premises up to the amount of her claim, before she would allow anybody else to take them. He says that he has a claim of about \$430 against the estate of William Van Dyke, deceased, for money lent to the latter, and that, a few days before the sale took place, the complainant came to his house and said to him that, if he would not bid on the mortgaged premises at the sale, she would pay the claim which he held against the estate of her husband; that he entered into an agreement with her, a few days before the sale, not to bid on the property, in consideration of her paying him his claim, and that he attended the sale of the property, but did not bid thereon. He further says that, if he had not entered into that agreement with her, he would have bid the property up to \$10,000, including therein the amount of the price of the mortgage. To the same effect is the testimony of her sister, the wife of Enoch Perrine. She says that, before the sale (and she thinks it was in the month of December, 1877) the complainant came to her house alone, and had a conversation with her husband (at which the witness, but no one else, was present) in regard to the estate of Mr. Van Dyke, and that the complainant then said that she did not want Mr. Perrine to bid on the farm against her; that she would pay him his claim if he would not do so; that her husband (Mr. Perrine) said that he would not bid on the farm if the complainant did not want him to do so, and that the understanding was that she was to pay his claim against the estate in full.

This conversation, to which Mr. and Mrs. Perrine testified, is not denied by the complainant. She was sworn as a witness under the petition, and, when interrogated as to the conversation, merely said that she had no recollection of having had it, but did not deny that she had made the offer and agreement to and with Perrine, testified to by him and his wife. It is manifest that, as the result of this agreement, she was enabled to obtain the farm at a very infa

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equate price. Enoch Perrine swears, as before stated, that, but for the agreement, he would have bid upon the property, and would have given for it \$10,000, if necessary. He attended the sale, but did not bid, because of the agreement. Under the circumstances, the sale should be set aside.

HARRIET A. KEELER

v

EZRA W. KEELER and others.

1. Cotton machinery, such as Danforth spinning-frames, twisting-frames &c., though fastened to the floor by nails or screws, or held in position by cleats,—*Held*, to be personal property, and to pass under a chattel mortgage thereof, as against a mortgage of the realty subsequently given, describing the property as "all those certain mills, factories &c., and all the machinery and fixtures in the same."

2. Personal property included in the chattel mortgage, but incorporated with the realty,—*Held*, not to pass by the chattel mortgage as against the subsequent mortgage of the realty. The property was a steam-engine, securely and permanently bolted to a foundation set in the ground, with the boilers as a necessary adjunct thereto, together with the shafting, belting, couplings and pulleys to communicate the power; also, water-wheels and a water-wheel governor. A gas-generator, situated in a pit in a building constructed for it on the premises, the gas-pump connected with it, and the pipes, were also included. Also, gas-burners, as not being furniture but mere accessories to the mill. Also, steam-heating-pipes laid on hooks attached to boards fastened to the walls, and heating-pipes, part of the system of piping, which merely rested upon the floor, without being attached to it.

3. The fact that property personal in its nature, but not incorporated with the realty, has, in transmission, been passed merely by the deed for the land, does not establish its character. Its character is not affected by long-continued localization alone.

Bill to foreclose chattel mortgage. On final hearing on pleadings and proofs.

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ant; that he heard her repeatedly say, before the day of sale, that she intended to bid the mortgaged premises up to the amount of her claim, before she would allow anybody else to take them. He says that he has a claim of about \$430 against the estate of William Van Dyke, deceased, for money lent to the latter, and that, a few days before the sale took place, the complainant came to his house and said to him that, if he would not bid on the mortgaged premises at the sale, she would pay the claim which he held against the estate of her husband; that he entered into an agreement with her, a few days before the sale, not to bid on the property, in consideration of her paying him his claim, and that he attended the sale of the property, but did not bid thereon. He further says that, if he had not entered into that agreement with her, he would have bid the property up to \$10,000, including therein the amount of the prior mortgage. To the same effect is the testimony of her sister, the wife of Enoch Perrine. She says that, before the sale (and she thinks it was in the month of December, 1877) the complainant came to her house alone, and had a conversation with her husband (at which the witness, but no one else, was present) in regard to the estate of Mr. Van Dyke, and that the complainant then said that she did not want Mr. Perrine to bid on the farm against her; that she would pay him his claim if he would not do so; that her husband (Mr. Perrine) said that he would not bid on the farm if the complainant did not want him to do so, and that the understanding was that she was to pay his claim against the estate in full.

This conversation, to which Mr. and Mrs. Perrine testified, is not denied by the complainant. She was sworn as a witness under the petition, and, when interrogated as to the conversation, merely said that she had no recollection of having had it, but did not deny that she had made the offer and agreement to and with Perrine, testified to by him and his wife. It is manifest that, as the result of this agreement, she was enabled to obtain the farm at a very in-

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HARRIET A. KEELER

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EZRA W. KEELER and others.

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Bill to foreclose chattel mortgage. On final hearing on pleadings and proofs.

THE SOUTHERN

THE SOUTHERN

THE SOUTHERN

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assignment, gave to her, to secure the payment of the note, and (as declared in the mortgage) by way of renewal, a mortgage, dated January 1st, 1876, upon the machinery in the mill, including engine and boilers, shafting, pulleys, gas-machine, office furniture, &c. The schedule mentions all the articles specified in the schedule to the Heman Keeler mortgage, with the addition of counters, warping-mills, a cutter, slubber-frames, spools, the engine, a gas-machine, works and attachments, gas-traps and gas-pipes, and some office furniture.

The bill states that that mortgage was duly filed in the clerk's office of Mercer county, on the 20th of January, 1876, and that afterwards Caroline Bemis, for a valuable consideration, assigned and endorsed the note to the complainant; that, subsequently, Ezra W. Keeler, in order to secure the payment of the note to the complainant, and, as declared in the mortgage, as "a renewal to secure a former indebtedness to Heman Keeler," gave her a mortgage, dated January 13th, 1877, upon the machinery, tools and office furniture in the mills, by the same description contained in the schedule to the Bemis mortgage; that the mortgage to the complainant was filed in the clerk's office, January 19th, 1877; that, in December, 1876, Ezra W. Keeler gave the complainant his three promissory notes, each for \$700, and payable respectively at six, twelve and eighteen months after date (December 22d, 1876), for interest on the note of \$20,000, and, to secure the payment thereof, gave her a mortgage upon "all the machinery and fixtures, of every nature and kind whatsoever, belonging to the cotton mills of his estate at Groveville, New Jersey"; that that description included certain goods and chattels not covered by the Bemis mortgage, viz., some cards, shoddy-machines, a cotton-lapper, a cotton-willow, some tables, a grinder, some presses, and a lot of tools in the bat-mills, also shafting, belting, pulleys &c.; and that that mortgage was filed on the 13th of January, 1877.

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The bill further states that, on or about the 19th of October, 1877, the persons composing the firm of James S. Woodward's Sons, recovered a judgment against the mortgagor, in the supreme court of this state, and on the same day Caleb J. Milne also recovered a judgment (now held, as appears by the answer, by James S. Woodward's Sons) against him in that court, on which judgments executions were issued and delivered to the sheriff; by reason whereof the mortgage to secure the payment of the three notes of \$700 each, became, by its terms, due. It provided that, if the mortgagor permitted judgment to be entered against him, the money should instantly be due.

The bill further states that, on or about the 7th of June, 1870, Ezra W. Keeler executed a mortgage to the persons composing the firm of James S. Woodward's Sons, upon his mills and factories, and the machinery and fixtures therein, to secure the payment of \$10,000.

The complainant insists that her mortgages are the first encumbrances on all the property therein mentioned.

The defendants, James S. Woodward's Sons, have answered. They, by their answer, attack the complainant's mortgages as fraudulent, and insist that they were intended as a cover for, and protection to, the property which they purport to mortgage, from the creditors of Ezra W. Keeler, and that there was, in fact, no indebtedness from the mortgagor to the mortgagees, or any of them, but that the notes and mortgages were all alike, mere fraudulent contrivances to deceive; and, further, that if there ever was any indebtedness for which they were given, it has been paid. They further insist that, when their mortgage was given, it was agreed that they should have a mortgage, not only upon the lands and real estate of the mortgagor, but that the mortgage should be a lien, also, on all the fixtures and machinery, of whatever kind, then in the mills, or which might subsequently be placed therein, whether held to be fixtures or not; and that Caroline S. Bemis had notice of the agreement when she took her chattel mortgage, and had

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notice, also, by the language of their mortgage, which was in record, that the mortgagor intended to mortgage hereby, not only the land and buildings, but also all the machinery and fixtures in the mills.

The proof establishes the debts which the complainants' mortgages were given to secure, and there is no evidence of bad faith on the part of the complainant or Caroline S. Lewis or Heman Keeler.

The mortgage to Heman Keeler was on file when the Woodward mortgage was taken. The firm of James S. Woodward's Sons, therefore, had constructive notice of it. Their mortgage was given under an agreement, dated June 15, 1870, between them and Ezra W. Keeler, by which they agreed to accept his time drafts (so, however, that the aggregate amount thereof should not at any time exceed the sum of \$10,000), and he agreed to consign all his yarns to them for sale, and not to consign any to any one else while the agreement should continue in force; and he also agreed to secure them against any loss or liability by reason of the acceptances, by his bond and mortgage for \$10,000, "certain properties situate in Mercer and Burlington counties," to be particularly described in the mortgage, and that the mortgage should at all times be a lien on those properties from the date of recording, so that, at all times, the defendants should have a lien thereon for the amount of their liability on the acceptances as of the date of recording the mortgage. The agreement was to remain in force until either party should give the other ninety days' written notice of intention to terminate it, and, on such notice, when and so soon as Ezra W. Keeler should deliver, or cause to be delivered, to the other party all drafts which they might have accepted under the agreement, they were to enter satisfaction of the mortgage. Prior to the making of this agreement, there was a verbal one between the parties to the same effect, and under it James S. Woodward's Sons lent to Ezra W. Keeler their acceptances in March, April and May, 1870, to the amount, in the aggregate, of

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\$10,000. Very soon after their mortgage was given, they learned of the existence of the mortgage to Heman Keeler. Mr. Hannis, the lawyer who drew their mortgage and who made search of the title for them, says that he ordered the searches when he sent the mortgage to be recorded (it was recorded in Mercer county, June 9th, 1870, and in Burlington county on the 15th of that month), and he says that immediately, on receiving the searches, communicated the fact that the records showed a greater amount of encumbrance than Ezra W. Keeler had represented to Mr. Woodward, and Mr. Woodward says he immediately, on receiving the information from Mr. Hannis, called on Mr. Keeler on the subject, and taxed him with deception, because he had not disclosed, but had concealed, the fact of the existence of the chattel mortgage. Though he says that he thus charged Ezra W. Keeler with fraud, and that his firm afterwards frequently demanded payment of the mortgage secured by their mortgage, yet it appears, by his testimony that, when the drafts accepted by them in March, April and May, 1870, became due (the last one fell due on the 1st of September, 1870), they had goods of Ezra W. Keeler in their hands, consigned to them under the agreement, sufficient to meet them, and he continued to consign his goods to them, and they to accept his drafts (which were very numerous), under the agreement, up to December 28, 1875, a period of more than four years.

Mr. Woodward says that the acceptances were mostly for three months, and that, during the period just mentioned there were always acceptances to the amount of \$10,000 outstanding secured by the mortgage. Though, as before mentioned, he says that they frequently demanded the money from Keeler, they never gave him notice to terminate the agreement, and they continued to transact business with him, receiving his yarns on consignment and accepting his drafts, so long as he continued in business for himself (till 1876), and even afterwards, when he carried on business as agent for another person; and, as appears

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the testimony, they were still doing so when Mr. Woodward testified in this cause.

Again, it appears by Mr. Woodward's testimony that, when he taxed Keeler with deceit, as before mentioned, the latter denied it, and said that when he told the defendants that there was nothing against the property but the first mortgage, he did not refer to the chattels or machinery, and thought it was unnecessary to mention such an encumbrance as the chattel mortgage. And he seems to have entertained this view in good faith. Early in February, 1869, he was advised (by letter dated February 5th), by counsel of this state, to whom he applied for advice on the subject, that all the property which he had mortgaged by the Heman Keeler mortgage was the subject of chattel mortgage. In this connection it may be stated that Mr. Hannis, the lawyer before mentioned, who drew the Woodward mortgage, says that Ezra W. Keeler and James S. Woodward were present when he received his instructions for drawing that instrument, and that his instructions were to draw a mortgage of \$10,000 on the mills, factories, lots of ground, machinery and fixtures in the mills, as described in the mortgage; and he adds that his instructions were embodied in the mortgage.

The mortgaged premises as described in the mortgage are "all those certain mills, factories, houses, lots and parcels of land, and all the machinery and fixtures in the same, commonly called Groveville, situate partly in the township of Hamilton, in the county of Mercer, and partly in the township of Chesterfield, in the county of Burlington, &c.," describing the land alone. It will have been seen that, by the written agreement, only the "properties" were mentioned, and nothing was said about fixtures or machinery, nor any reference made to them. This gives color to Mr. Keeler's statement, that he did not intend to mortgage the machinery and fixtures to James S. Woodward's Sons. The Woodward mortgage was never filed. James S. Woodward's Sons have no equity against the complainant;

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but, on the other hand, the latter has an equity against them. If there was bad faith on the part of Ezra W. Keeler towards the firm of James S. Woodward's Sons, in concealing from them the fact of the existence of the Heman Keeler mortgage until after they had given their acceptances, there was none on the part of Heman Keeler. If there was bad faith on the part of Ezra W. Keeler, they ascertained the fact almost immediately after their mortgage was given, and they had the means, through his consignments to them, of protecting themselves; and they also had the means of protection under their mortgage, for it is shown that the real estate, without the machinery, was valued, in October, 1871, by a professional appraiser, at \$156,000, and it was subject to only \$20,000 of encumbrance prior to the Woodward mortgage of \$10,000.

Ezra W. Keeler testifies that, after he obtained the appraisement, he showed it to James S. Woodward, and referred to the improvements, and told him he had no intention of mortgaging to James S. Woodward's Sons anything but the real property, without the fixtures, and he says Mr. Woodward seemed satisfied. If there was concealment or deceit on the part of Ezra W. Keeler in regard to the existence of the chattel mortgage, that would not affect the validity of the instrument or its lien.

Again, the first acceptance for Mr. Keeler which was protested, fell due in February, 1876. So that, as before remarked, for more than four years after the firm of James S. Woodward's Sons learned of the existence of the chattel mortgage, they continued the arrangement with Ezra W. Keeler, though they might have terminated it on ninety days' notice, and they received consignments of goods from him, under the agreement, to the amount of from \$30,000 to \$40,000 each year. Mr. Woodward gives as one of the reasons for not putting an end to the arrangement after he learned of the existence of the chattel mortgage, his firm's unwillingness to lose Keeler's business. They knew, five years before Ezra Keeler's failure in business, that th

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claim of \$20,000 outstanding against him, secured by Heman Keeler mortgage and its renewals, and they acted in the mortgage. And, further, from time to time during that period, their acceptances were paid off, and new ones were given with full knowledge of the existence of the chattel mortgage. The acceptances which had been paid when their mortgage was made, were all paid in 1870. When they gave new ones, it was as if they had taken a new mortgage. They manifestly have no equity against the complainant.

The cause, however, will be disposed of on the legal merits of the parties.

The mortgage to Heman Keeler has never been cancelled. It is entitled to priority as to so much of the property hereby mortgaged as has not changed its character as realty, but it is not entitled to priority as to so much as, from annexation to the freehold, has become part of realty. *Pierce v. George*, 108 Mass. 78; *Voorhees v. Kniss*, 48 N. Y. 278. It is urged that, not having been cancelled after 1875, it became void as against the Woodward mortgage; but the position is untenable. If it had never been refiled after the Woodward mortgage was given, the mortgagees in the latter, having had notice of it, could have no advantage from the omission to refile. *Meech v. Smith*, 14 N. Y. 71. The statute was, by its terms, enacted for the protection of creditors and mortgagees, and purchasers in good faith. The firm of James S. Woods & Sons, having had notice of the chattel mortgage when they took their mortgage, are not within the protection of the statute. They are not mortgagees in good faith. *Amson v. N. J. Southern R. R. Co.*, 2 Stew. 311, 336; *N. J. Midland R. R. Co.*, 4 Stew. 105; *Thomas on Mortgages* 505.

As to the property contained in the Bemis mortgage and mortgages given to the complainant, which was not included in the Heman Keeler mortgage, the former are, old, new mortgages; but (as far as property personal in

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its character, and not so annexed to the freehold as to have become part of the realty, is concerned) they have priority over the Woodward mortgage, which, as before stated, was never filed. The Bemis mortgage, and the mortgage given to the complainant, will be considered, as the parties to them intended that they should be, as additional security for the payment of the Heman Keeler debt.

Part of the property mortgaged by the Heman Keeler mortgage was so annexed to the freehold as to be part of the realty, and, therefore, was not subject to the chattel mortgage as against the Woodward mortgage. The fact that it was included in a chattel mortgage, will not affect its character. *Williamson v. N. J. Southern R. R. Co.*, 2 Ste. 311, 328; *Voorhees v. McGinnis*, 48 N. Y. 278; *Quinby v. Manhattan Cloth Co.*, 9 C. E. Gr. 260. The Woodward and Milne judgments were not recovered until October, 1871, long after the last of the complainant's mortgages was filed.

It remains to consider what part of the mortgaged property in question is so annexed to the realty as not to pass under the complainant's mortgages as against the Woodward mortgage. The machinery and apparatus for furnishing motive power, light and warmth to the buildings are in this case part of the realty. The steam-engine is secure and permanently bolted to a foundation set eight or ten feet deep in the ground, and it was put in for permanent use. It, with its appurtenances, is part of the realty, and so are the boilers which are a necessary adjunct to it, also the shafting, belting, couplings and pulleys to communicate the power; and, also, the water-wheels and water-wheel governor. *Crane v. Brigham*, 3 Stock. 29; *Quinby v. Manhattan Cloth Co.*, 9 C. E. Gr. 260; *Keve v. Paxton*, 11 C. E. Gr. 107; *Fish v. Waterproof Paper Co.*, 2 Stew. 16; *S. on appeal*, sub nom. *McMillan v. Fish*, Id. 610; *Watson v. Watson Manufacturing Co.*, 3 Stew. 483.

The apparatus for the manufacture of gas (called a generator) is situated in a pit made expressly for it in a small building built for it a short distance from the main buildi

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It is connected with a gas-pump in the building, and the pipes are attached to the beams and girders by hooks, and, in some places, pass through holes in the side walls, bored for the purpose. The generator and its appurtenances, and the pipes, are fixtures. *Hays v. Doane*, 3 Stock. 84, 96; *Excell on Fixtures* 299; *Regina v. Lee*, L. R. (1 Q. B.) 242. The gas-burners are of the same character in this case. They are in no sense furniture, but are mere accessories to the mill. *Sewell v. Angerstein*, 18 L. T. (N. S.) 300.

Some of the heating-pipes are laid on hooks attached to boards which are fastened to the walls. They may be removed without disturbing the boards or hooks. In one place there are two nests of piping which rest on the floor without being attached to it. Such pipes so attached for heating purposes, were, under like circumstances, held to be fixtures, in *Quinby v. Manhattan Cloth Co.*, *ubi supra*. See, also, *Philbrick v. Ewing*, 97 Mass. 133, and *Stockwell v. Campbell*, 39 Conn. 362. Those which rest on the floor are not to be excepted under the circumstances. They are part of the system of piping in the building.

The rest of the property mentioned in the complainant's mortgages, is personal. The Danforth cap spinning-frames, Danforth cap twisting-frames, the ring and traveler twisting-frames, balling-machines, carding-machines, grinding-machines, drawing-frames, Higgins or jack fly-frames, Higgins slubber, counter twist-speeders, mules, and other machines, though most of them are fastened to the floor by nails or screws, or held in position by cleats, are personal property. They are annexed merely to keep them in position; some of them could not be operated unless held firmly in place. Though, in putting down a new floor, it was laid down around the feet and standards of the machines, it was not laid over but only up to them.

What was said in *Blanke v. Rogers*, 11 C. E. Gr. 563, 568, is applicable to the machines under consideration: "There appears to have been no special adaptation of these machines to the place where used, nor any preparation of

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the place to receive them. They were suitable and proper to be there, if such instruments were required for their appropriate work, but equally suitable and useful elsewhere. They were movable in the building. They were made and designed not for this place or any particular place; they were constructed, after fixed patterns, for all purchasers—things in gross, mere implements, heavy and complicated tools. If they ceased to be used in this factory, they were movable without alteration, without detriment to the building, and could be used equally well in another place provided with power to drive them.”

In *Murdock v. Gifford*, 18 N. Y. 28, cited in *Blanche v. Rogers*, looms in a woolen factory, connected with the motive power by leathern bands (but not otherwise annexed to the building than by screws holding them to the floor, which kept them steady while working), and which could be removed without injury to themselves or the building, were held to be chattels, as between the holder of a mortgage of the factory in which the looms were included, by express description, and a judgment creditor. The mortgage, though recorded, had not been filed. The distinction is there drawn clearly between the wheel or engine which furnishes the motive power, and all that part of the gearing and machinery which has special relation to the building with which it is connected, as belonging to the freehold, and independent machines, such as looms, which, if removed, still retain their identity and usefulness, and do not lose their character as personalty.

In *Teaff v. Hewitt*, 1 Ohio St. 511, it was said that the machinery and implements in a manufacturing establishment, although useful, and even essential, for the business carried on, which are not permanently affixed to the ground or structure of the building, and which can be easily removed, without material injury to the building or the articles themselves, and their places supplied by other articles of a similar kind, are not fixtures, but personal property; but that that portion of the property, in such a

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establishment, which is firmly affixed to the earth, or to the structure of the building, and which, from its nature, mode of attachment, use and the relative situation of the party placing it there, was plainly intended to be permanent, is parcel of the freehold. See, also, *Walker v. Sherman*, 20 Wend. 636; *Swift v. Thompson*, 9 Conn. 63, and *McConnell v. Blood*, 123 Mass. 47. The decision in the case of *Blancke v. Rogers* fixes the character of the property under consideration.

It was urged, on the hearing, that the fact that some of those machines passed to Ezra W. Keeler with the real estate (and he had no other paper title thereto than the deed of the land), and the fact that the machines had been, for many years, used in the same place, in carrying on the operations of the mill, and that there was a long-existing localization of them, were, of themselves, considerations to induce and warrant an adjudication that they had been regarded as, and, in fact, were, part and parcel of the realty. But this subject was considered, and that view rejected, by the court of errors and appeals, in *Williamson v. N. J. Southern R. R. Co.*, 2 Stew. 311, 328. It was there said that the method of transmuting property personal in its nature into realty, is as fixed and established in the law as the method of testamentary disposition; that personal property does not become realty by mere use in connection with land; that it will not become realty by being included in a mortgage with lands, any more than lands will become personalty by such an association. See, also, *Quinby v. Manhattan Cloth Co.*, 9 C. E. Gr. 260, 267, and *Murdock v. Gifford*, 18 N. Y. 28.

The complainant's mortgages are valid liens, superior to the Woodward mortgage, on all the property mentioned in, and covered by, them, except so much of it as is incorporated with the realty.

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 Blumenthal v. Tannenholtz.

RACHEL BLUMENTHAL

v.

MOSES TANNENHOLZ.

1. The domicil of a legitimate, unemancipated minor is, if his father be alive, the domicil of the latter.

2. Where neither of the parties to a marriage resides here, this court will not take jurisdiction of a suit to annul the contract on ground that the contract was made here.

3. An infant, whose parents resided in Canada, filed a bill to annul her marriage, on the ground of her husband's fraud and misrepresentation as to the effect of a Jewish ceremony performed in this state which she at the time believed to be merely a betrothal. Her husband was domiciled elsewhere.—*Held*, that she was incapable of changing her own domicil, and that, consequently, the court had jurisdiction.

Bill for decree annulling marriage. On final hearing of pleadings and proofs.

NOTE.—Unless expressly forbidden by statute, the rule of the common law, that fixes the age of marriage consent for males at fourteen and for females at twelve, prevails in the United States, and such marriage, although without the parents' consent, is valid. *Bennett v. Smith*, 21 Barb. 439; *Parton v. Hervey*, 1 Gray 119; *Governor v. Rector*, Humph. 57; *Warwick v. Cooper*, 5 Sneed 659; *Hargroves v. Thompson*, Miss. 211; *Shutt v. Carliss*, 1 Ired. Eq. 232; *Askew v. Dupree*, 30 Ga. 17; *Fitzpatrick v. Fitzpatrick*, 6 Nev. 63. See *Harrison v. Southampton*, 4 De M. & G. 137; *Sherwood v. Ray*, 1 Moo. P. C. C. 353; *Rex v. Birmingham*, 8 Barn. & Cress. 29; *Barker v. Taylor*, 1 C. & P. 101; *Cotten v. Rutledge*, 33 Ala. 110; *Hiram v. Pierce*, 45 Me. 367; *Ferrie v. Public Adm'r*, 4 Bra 28; *Ely v. Gammell*, 52 Ala. 584.

As to the civil law rule, see *Grigsby v. Louisiana Bk.*, 3 La. 491; *B v. Wilson*, 18 Tex. 367.

Query, Whether there is any legal presumption that a wife is over fifteen years of age. *Bruce v. Arrington*, 22 Ark. 362.

Whether a parent can recover damages against a person who, without force or fraud, marries his child, when between twelve and twenty-one years of age, see *Goodwin v. Thompson*, 2 Greene (Ia.) 329; *Jones Tevis*, 4 Litt. 25; *Hervey v. Moseley*, 7 Gray 479; *White v. Henry*, Me. 531.

For the English rule, see *Bevan v. McMahon*, 2 Sw. & T. 58; *Well Cottam*, 3 Sw. & T. 364, 593.

But such marriage is void if any fraud or imposition be practiced on the infant. *Harford v. Morris*, 2 Hagg. 423; *Lyndon v. Lyndon*, 69 43; *Aymar v. Roff*, 3 Johns. Ch. 49; *Ferlat v. Gajon*, Hopk. Ch. 4

Blumenthal v. Tannenholz.

Mr. G. A. Hobart, for complainant.

THE CHANCELLOR.

This is a suit for a decree annulling a marriage for fraud. The parties are Jews. The complainant alleges that she was induced to enter into a contract of marriage here, without knowing it to be such, with the defendant, by the false and fraudulent representations of the latter to her, that the ceremony was a mere betrothal, such as is common among the Jews. Neither of the parties then resided in this state. The defendant does not now reside here. He has not been

Clark v. Field, 13 Vt. 460; *Robertson v. Cole*, 12 Tex. 356; *Field's Case*, 2 H. of L. Cas. 48.

Although an infant is not bound by a promise to marry (*Pool v. Pratt*, 1 Chip. 252; *Hunt v. Peake*, 5 Cow. 475; *Hamilton v. Lomax*, 26 Barb. 615; *Feibel v. Obersky*, 13 Abb. Pr. (N. S.) 402, note), yet the adult with whom such promise is made, is bound (*Holt v. Ward*, 2 Str. 937; *Simmons v. Simmons*, 8 Mich. 318; *Willard v. Stone*, 7 Cow. 22; *Cannon v. Alsbury*, 1 A. K. Marsh. 76; *Warwick v. Cooper*, 5 Sneed 659; *Beelman v. Roush*, 26 Pa. St. 509); and a female between eighteen and twenty-one years of age, may lawfully release a contract to marry (*Develin v. Riggsbee*, 4 Ind. 464). See *Corhead v. Mullis*, L. R. (3 C. P. D.) 439.

A marriage between parties under the legal ages above stated, may be ratified by their living together after arriving at lawful age. *People v. Slack*, 15 Mich. 193; *Coleman's Case*, 6 City Hall Rec. 3; *Koonce v. Wallace*, 7 Jones Law 194; *Shafer v. State*, 20 Ohio 1; *Beggs v. State*, 55 Ala. 108; *Cooley v. State*, 55 Ala. 162; *Walls v. State*, 32 Ark. 565.

By the marriage of a minor, the guardian is discharged (*Porch v. Fries*, 3 C. E. Gr. 204; *Sallee v. Arnold*, 32 Mo. 532; *Wood v. Henderson*, 2 How. (Miss.) 893; *Metcalf v. Lowther*, 56 Ala. 312; *Shutt v. Carlross*, 1 Ired. Eq. 232; *Beazley v. Harris*, 1 Bush 533; *Ex parte Post*, 47 Ind. 142); unless such minor marry another minor (*State v. Joest*, 46 Ind. 235; *Nicholson v. Wilborn*, 13 Ga. 467; see *Hopkins v. Virgin*, 11 Bush 677); but it seems that a female ward in chancery is not, of course, discharged from the protection of the court, by marriage (*Whitaker's Case*, 4 Johns. Ch. 378); nor are her funds, while in court, liable to attachment for her husband's debts (*Godbold v. Bass*, 12 Rich. 202; see, also, *Poter's Case*, L. R. (7 Eq.) 484; *White v. Herrick*, L. R. (4 Ch.) 345).

A legitimate infant takes the domicil of its father (*Andrews v. Herriot*, 4 Cow. 516, note); although such infant be posthumous, and its mother again married (*Oxford v. Bethany*, 19 Conn. 229); or not actually residing with such parent (*Adams v. Oaks*, 20 Johns. 282; *Parsonsfield v. Kennebunkport*, 4 Me. 47; *Ryall v. Kennedy*, 40 N. Y. Sup. Ct. 347; *Brown v. Lynch*, 2 Bradf. 214; *Helffenstein v. Thomas*, 5 Rawle 209; *Rex v. Lawford*, 8 Barn. & Cress. 271).

It is said that by marriage a minor may acquire the domicil of his wife (*Phillim. on Dom.* 50; see *Bucksport v. Rockland*, 56 Me. 23).

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served with process. The complainant was, when the suit was brought, and still is, a minor. Her parents reside in Canada. There is no evidence that she has been emancipated, but, on the other hand, the inference from the evidence is to the contrary. The only evidence adduced to prove that her residence is in this state, is her own testimony that she is a resident of Newark, and has resided there for the last eighteen months. Unless one of the parties was domiciled here when the suit was brought, the court has no jurisdiction in the case. *2 Bish. on Mar. & Div. § 144.* The fact that the marriage took place here

A marriage contrary to the English act was held to be void, and the wife could derive no settlement therefrom (*Chinham v. Preston*, *W. Bl.* 192; *Rex v. Northfield*, *Doug.* 634); but in *Rex v. Birmingham*, *Barn. & Cress.* 29, a marriage of a female pauper, brought about by fraud of the parish officers, was held to confer a settlement in her husband's parish; see, however, *Barnes v. Wyethe*, 28 *Vt.* 41; and in *John v. Huntington*, 1 *Day* 212, a lunatic pauper was held to have gained, by her marriage, a settlement in the state where her husband resided, although the marriage was null.

In *Lake v. South Caanan (Pa.)*, 18 *Alb. L. J.* 116, the settlement of a divorced female pauper was held to be that of her husband; although by the desertion of her husband a woman may gain her own domicile (*Moffatt v. Moffatt*, 5 *Cal.* 280; *Johnson v. Johnson*, 12 *Bush* 485).

Under what circumstances, generally speaking, a woman may acquire a separate domicile, for the purpose of instituting proceedings in divorce, see *Cooley's Const. Lim.* (4th ed.) 401; also, *Hick v. Hick*, *Bush* 670; *Craven v. Craven*, 27 *Wis.* 418; *Jenness v. Jenness*, 24 *Ind.* 3; *Vence v. Vence*, 15 *How. Pr.* 497, 576; *Hope v. Hope*, 27 *E. L. & E.* 2; *Dutcher v. Dutcher*, 39 *Wis.* 651.

In England, an infant may not sue for a divorce in his or her own name, but must do so by a *prochein ami* (*Barham v. Barham*, 2 *Hagg. Du Terreaux v. Du Terreaux*, 1 *Sw. & Tr.* 555; *Beavan v. Beavan*, 2 *Sw. Tr.* 652; *Morgan v. Thorne*, 7 *M. & W.* 400); and this rule has been followed in this country in some instances (*Wood v. Wood*, 2 *Paige* 164; *E. B. v. E. C. B.*, 28 *Barb.* 299, 8 *Abb. Pr.* 44; *Kenley v. Kenley*, *How. (Miss.)* 751); although denied in others (*Jones v. Jones*, 18 *L.* 308; *Besore v. Besore*, 49 *Ga.* 378). See *Anderson v. Anderson*, 11 *Ba.* 327; *Adams v. Hannon*, 3 *Mo.* 222; *Worthy v. Worthy*, 36 *Ga.* 45; *Garn v. Garnett*, 114 *Mass.* 379; *Crump v. Morgan*, 3 *Ired. Eq.* 91.

An infant widow may not be appointed administratrix of her husband's estate (*Collins v. Spears*, *Walk. (Miss.)* 310; *Wallis v. Wallis*, 1 *Wins.* 78); and if she should be allowed so to administer, she would not be bound personally on a note given by her for her husband's debt. *Poole v. Hines*, 52 *Ga.* 500. See, further, *Cobb v. Brown*, *Spec. Ch.* 564; *Carow v. Mowatt*, 2 *Edw. Ch.* 57; *Hindmarsh v. Southgate*, 3 *Ru.* 324; *Chapple v. Cooper*, 13 *M. & W.* 252; *Loop v. Loop*, 1 *Vt.* 177.—Ri

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will not confer jurisdiction. *Id.* § 198. The complainant, indeed, swears that she resides here, but she also swears that her parents reside in Montreal, in Canada, and have resided there for the past ten years, and that, when this suit was instituted, she was, and still is, a minor. She does not claim to have been emancipated from her parents, nor does she give any reason for her change of abode from Canada to New Jersey. Her domicil, therefore, must be adjudged to be that of her parents. The domicil of the legitimate unemancipated minor who is not *sui juris*, and whose will, therefore, cannot concur with the fact of his residence, is, if his father be alive, the domicil of the latter. *Phillim. on Dom.* § 7. It is an undisputed position of all jurists, says that writer, that, of his own accord, *proprio Marte*, the minor cannot change his domicil. *Ibid.* See, also, *Story on Confl. of Laws* § 46. The burden of proof to establish the change of domicil on the part of the minor, is on him. *Id.* § 47. It is not claimed that the complainant has gained domicil through her marriage. The defendant does not appear to have ever resided in this state.

The bill will be dismissed.

BARBARA KESTLER

v.

LOUIS KESTLER.

Where a wife declared to her husband, with whom she was living in her house, that he must leave the house, or else she herself would (he not having been guilty of cruelty to justify her action), his leaving her under such circumstances is not desertion.

On petition for divorce.

Mr. T. D. Hodges, for petitioner.

Kestler v. Kestler.

THE CHANCELLOR.

The petitioner sues for a divorce from the bond of matrimony from her husband, on the ground of willful, continued and obstinate desertion for three years and upwards. The parties were married on the 5th of August, 1863. They lived together for about six weeks immediately thereafter, in Elizabeth, in this state, in a house belonging to the petitioner. He then left her, and went to live at the house of his father, in that city, and has lived there ever since. She has ever since lived in her house. At the time of the marriage she was a widow with three children, and was about twenty-eight years of age. He was about twenty-four.

The bill was filed on the 23d of October, 1878. It appears, by the testimony of the petitioner, that the defendant left her house in pursuance of her positive declaration to him that either he must go or she would. She says that he said her house was no home to him, and she then replied that, if it was no home, he should go. She states, as her reason for her declaration above mentioned, that he was jealous of her, and charged and taunted her with infidelity to him. Whether with or without good reason, does not appear, except as she may be regarded as denying a charge of which she complains. It is true, her son, a boy of fifteen, says his mother and the defendant used to "fight" and scold, but it is clear, from the testimony, that the defendant used no violence to the complainant. She complains of no violence, but only of his jealousy, and the charges against her which resulted from it. It is urged, by her counsel, that such conduct on the part of the defendant would have justified the petitioner in leaving him, and if she had done so, for that cause, and had remained away three years, without overtures for her return on his part, accompanied with promises of better conduct, she would have been entitled to a divorce, on the ground of desertion. But, in the first place, the conduct of which she complains is proved only by her own testimony: and, again, it would

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seem, from his letter to her, written April 27th, 1878, put in evidence by her, that he was unwilling to leave her; that she had twice ordered him away, but, on the first occasion, had, through his importunities, relented, and permitted him to stay. Under the circumstances, he cannot be found guilty of desertion from the time when he left her house. She not only consented to his leaving, but insisted on his doing so, and it does not appear that his conduct was such towards her as to justify her in separating herself from him, had he refused to leave her. The circumstances are not such as to entitle her to a divorce. *Jennings v. Jennings*, 2 Beas. 38; *Moore v. Moore*, 1 C. E. Gr. 275; *Belton v. Belton*, 11 C. E. Gr. 449.

HENRY SCHATT

v.

AUGUST F. GROSCH and others.

The charter of the city of Elizabeth of 1863, § 73, provides that any taxes thereafter assessed on lands shall be a lien for two years, paramount to any encumbrance thereon; and, by § 83, such lands may be sold for the lowest term of years (but in no case exceeding *fifty years*) for which any person will take the same and pay the amount of the taxes and charges; and, by another clause of § 83, such lands, if not bid for when offered at public sale, shall be struck off to the city for the term of *fifty years*. By a supplement of 1873, the limitation as to time contained in the *first clause* of § 83, is repealed. For non-payment of taxes for 1872, 1873 and 1874, on certain lands, they were struck off to the city in each year for a term of *nine hundred years*. The complainant's mortgage on the premises was given in January, 1872, and a second mortgage thereon in June, 1872. The second mortgagee redeemed the lands, in July, 1875, by paying the taxes and charges and interest up to that time, took possession, and afterwards paid the taxes for 1875, 1876 and 1877, and collected the rents.—*Held*,

(1) That the sale to the city, because it was for a term (nine hundred years) unauthorized by law, was void, and that the second mortgagee could derive no title therefrom.

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(2) That the second mortgagee must account for the rents and profits, to the end that it may appear whether anything is due to it for taxes paid. In the account, it will have credit for necessary repairs and for any balance in its favor it will be entitled to a lien paramount to the complainant's mortgages. If there shall appear to be a balance in its favor, after charging it with all taxes assessed, though not paid, the balance will be credited on its mortgage. In the account, between it and the complainant, it will not be allowed for insurance premiums paid by it for its own security merely. Interest on taxes paid by it when it went into possession, and subsequently thereto, will be allowed at the lawful rate, i. e. at seven per cent. per annum up to July 4th, 1878, and six per cent. afterwards; and allowance will be made for interest paid by it on taxes which were a lien when it went into possession, but not at a rate exceeding that fixed by the charter on taxes paid before sale.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. E. S. Atwater, for complainant.



Mr. T. F. McCormick, for the building and loan association.

THE CHANCELLOR.

The questions presented for decision are, whether the building and loan association, which is the holder of mortgage subsequent to those of the complainant, is entitled to priority over the latter for money paid for taxes assessed upon the mortgaged premises by the city of Elizabeth subsequently to the making of the complainant's mortgages; and, if so, what rate of interest the money should bear. The complainant's mortgages are dated January 1st, 1871. One is for \$4,500 and interest, and the other for \$600 with interest. The former was recorded January 20th, 1872, and the latter May 3d in that year. For non-payment of the taxes of 1872, 1873 and 1874, the premises were sold by the city and bid in by it each time for a term of nine hundred years. The building and loan association (its mortgage is dated

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June 26th, 1872) redeemed them, on the 29th of July, 1875, by payment of the tax and costs of sale, with interest on both at fifteen per cent. per annum, taking from the city a declaration of sale for the taxes of 1872, and a certificate of sale for the taxes of each of the two following years respectively. It subsequently paid the taxes of 1875, 1876 and 1877. It took possession under the declaration of sale, and had collected \$295.75 of the rents of the mortgaged premises up to the time when the testimony in the cause was taken.

The charter of the city of Elizabeth (*P. L. 1863, p. 109 § 73*) provides that any assessment of taxes thereafter made upon any lands and real estate in the city, shall be and remain a lien on such land and real estate, with interest thereon, and all costs and fees, for the space of two years from the time when such assessment shall be made, notwithstanding any devise, descent, alienation, mortgage or other encumbrance thereof, &c. By a supplement to the charter (*P. L. 1869, p. 1093*), it is enacted that all assessments for taxes shall be a lien on the lands and real estate bound by such assessments, from the day in each year when the duplicates are delivered to the receiver of taxes, and shall, with the interest and expenses accruing thereon, remain a lien thereon for the space of four years, unless sooner paid or discharged by the sale of the lands and real estate. The taxes assessed upon the property were a lien thereon paramount to the complainant's mortgages when the sales were made, and, if the sales had been duly made pursuant to the provisions of the charter, the title would have been paramount to those mortgages. *Trustees of Public Schools v. City of Trenton, 3 Stew. 667*. But they were not legal. At each of them, the property was struck off to the city for a term of nine hundred years, while fifty years was the term fixed in the charter.

The charter (*P. L. 1863, p. 109 § 83*) provides that, if any tax or assessment remain unpaid on the day specified in the notice, the city treasurer shall proceed to sell, by public

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auction, at the time and place appointed therein, the land and real estate on which the tax or assessment shall have been imposed or may be a lien, for the lowest term of years, but in no case exceeding fifty years, for which any person will take the same and pay the amount of the tax or assessment, with the interest thereon, and all costs, fees, charges and expenses; that such payment shall be made before the conclusion of the sale, and that, if not so made, the treasurer may resell the property, or the city may have its action against the purchaser for the payment and interest at the rate of fifteen per cent. per annum; that the sale may be adjourned, from time to time, until the lands and real estate are disposed of, and such as are not bid for when offered for sale or for resale, shall be struck off to the city for the term of fifty years. By the eighty-fifth section it is provided that, if the city becomes the purchaser, the certificates shall be assignable. By a supplement (*P. L. 1877*, p. 778 § 22), it is enacted that the portion of the first clause of the eighty-third section which limits the term for which real estate may be sold for taxes and assessments to fifty years, be amended by the repeal of the limitation, and that thereafter, such sales be made for the shortest term in which any bidder at the public sale will take the property and pay the taxes or assessments, and interest, costs and charges thereon. By this supplement, the provision in the charter limiting the term for which the property may be struck off to the city was not affected. When, therefore, the property was, for want of a bidder, struck off to the city for nine hundred years, it was struck off for a term not warranted by law. The sale was void, and no title passed.

The building and loan association must account for the rents and profits while it has had possession of the mortgaged premises, to the end that it may appear whether anything is due to it for taxes paid. In the account, it will have credit for necessary repairs, and, for any balance in its favor, it will be entitled to a lien paramount to the complainant's mortgages. If there appears to be a balance in

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its favor, after charging it with all taxes assessed, though not yet paid, the balance will be credited on its mortgage. In the account, as between it and the complainant, it will not be allowed for insurance premiums paid by it for its own security merely. Interest on taxes paid by it when it went into possession, and subsequently thereto, will be allowed at the lawful rate, *i. e.* at seven per cent. per annum up to the 4th of July, 1878, and at six per cent. after that time. Allowance will be made for interest paid by it on taxes which were a lien when it went into possession, but not at a rate exceeding that fixed by the charter on taxes paid before sale. The association has no valid claim to the rents and profits under the declaration or certificates of sale, for, as before stated, they passed no title.

In the matter of the alleged lunacy of WILLIAM B. HILL.

In a return to a writ *de lunatico inquirendo*, that the alleged lunatic "is a lunatic and of unsound mind, and does enjoy lucid intervals, so that he is not capable of the government of himself, his lands, tenements, goods and chattels," the phrase italicized, whether read parenthetically or not, is not objectionable either in form or fact.

Mr. A. C. McLean, for petitioner.

THE CHANCELLOR.

The return is, that William B. Hill, the subject of the inquiry, "is a lunatic and of unsound mind, and does enjoy lucid intervals, so that he is not capable of the government of himself, his lands, tenements, goods and chattels;" and the question is, whether this return should be confirmed as a return that the alleged lunatic is incompetent to govern himself or his affairs. The objection is, that it appears that he has lucid intervals, from which it must be assumed that

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he is at times capable of managing himself and his property. It would be enough to say, in answer to this objection, that, although the return states that he enjoys lucid intervals, it expressly declares that he is not capable of governing himself or his estate, notwithstanding the fact that he has lucid intervals. The words "and does enjoy lucid intervals" may be read in parentheses. In fact the lunatic has no lucid intervals. He has only occasional momentary returns of the power of recognition of a few most familiar objects, with an immediate relapse into his former condition of fatuity. It is not necessary that the return should state whether the lunatic has lucid intervals or not. *Ex parte Ferne*, 5 Ves. 450; *Shelford on Lunacy* 111.

The practice of inserting in the return a finding on the subject of lucid intervals, is derived from the ancient practice under the writ *de lunatico inquirendo*, which was applicable only to those who were alleged to be lunatics according to the signification of the term as it was then understood. Anciently, only those insane persons who enjoyed lucid intervals were regarded as lunatics; the mental disorder being thought to be dependent on the moon, and, therefore, intermittent. 1 *Bla. Com.* 304; *Collinson on Lunatics*. Commissions in the nature of the writ *de lunatico inquirendo* were, therefore, devised to meet the case of persons of unsound mind who had no lucid intervals and who consequently were not considered lunatics. To such the writ *de lunatico inquirendo* was deemed not to be applicable.

"I have reason to believe," said Lord Eldon, "the court did not, in Lord Hardwicke's time, grant commissions in lunacy in cases in which it has since been granted. At late, the question has not been, whether the party is absolutely insane; but the court has thought itself authorized (though certainly many difficult and delicate cases with regard to the liberty of the subject occur upon that) to issue the commission, provided it is made out that the party is unable to act with any proper and provident management liable to be robbed by any one; under that imbecility"

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mind not strictly insanity, but, as to the mischief, calling for as much protection as actual insanity." *Ridgeway v. Darwin*, 8 Ves. 65, 66.

With modern views, under modern practice, there appears to be no reason, except, perhaps, the propriety of describing the malady by stating its character, for finding whether the lunatic has or has not lucid intervals. Those who are of unsound mind, but with intervals of sanity, require the protection of the courts in regard to their property quite as much as those whose condition is that of continued, unabating insanity; for, obviously, the contracts of the latter would be far more easily avoided than those of the former. And if the court takes charge of those who, though insane, have lucid intervals, of course it will do so in the case of those who have no such intervals. Lord Eldon quashed a return, "A lunatic enjoying lucid intervals, and, during such, capable of managing his affairs," and ordered a new commission, although it was urged, on behalf of the lunatic, in opposition, that it appeared by the return that he was capable of managing his affairs. *Ex parte Atkinson*, Jacob 333.

The inquisition will be confirmed.

WILLIAM F. HUTCHINSON

v.

JOHN SWARTSWELLER.

1. Accepting the mortgagor's note for interest due on a mortgage, does not pay the debt nor discharge the lien.

2. Taking a second security of equal degree with the first, for the same debt, does not extinguish the first, unless the creditor accepts it with that understanding.

3. Where a first mortgagee accepts a new mortgage, and surrenders a prior one for cancellation, in ignorance of the existence of an inter-

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vening lien, equity, in the absence of laches or other disqualifying fact, will restore him to his original position.

4. In equity, an obligee is entitled to recover the full amount due his bond, though it may exceed the penalty.

On exceptions to master's report, filed by Leah Snyder, one of the defendants.

Mr. H. S. Harris, for exceptant.

Mr. L. D. Taylor, for complainant.

THE VICE-CHANCELLOR.

The defendant, who excepts to the master's report, has two mortgages, prior in date and registry to that of complainant. They were given to secure the annual payment of the interest of certain sums during the defendant's life. Receipts for all interest accrued up to March 31, 1877, are endorsed on the bonds given with the mortgages, but it is admitted they mainly represent the mortgage notes, which have never been paid. On February 18, 1878, the defendant was induced to accept a mortgage embracing the same premises covered by her two prior mortgages, for the amount of the notes, and to surrender the notes. Five mortgages were executed by the mortgagor in the interval between the date of her two first and the date of her last. The complainant holds one of the five. When the defendant accepted the last, she was ignorant of the existence of all others, except, perhaps, one dated two days before the date of her last. The complainant insists that the defendant, by accepting the last, extinguished the lien of her two prior mortgages to the extent of the debt secured by the last. The master adopted this view, and has so reported.

The question is one of intention. Simply accepting the mortgagor's notes did not pay the debt, nor discharge the lien of the mortgages; nor did the subsequent surrender

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the notes for the last mortgage have that effect. *Shipman v. Cook*, 1 C. E. Gr. 251; *Rogers v. Traders Ins. Co.*, 6 Paige 595; *Dunham v. Dey*, 13 Johns. 40. Nor will the taking of a second security, of equal degree with the first, for the same debt, by operation of law extinguish the first. Acceptance of the second will only operate as an extinguishment of the first, when it is shown that the creditor accepted the second mortgage with the understanding that that should be its effect. *Gregory v. Thomas*, 20 Wend. 17; 2 Jones on Mort. § 929.

Judge Comstock, in *Hill v. Beebe*, 13 N. Y. 564, says: "The proposition is, indeed, quite elementary that the mere act of taking a new security from the same party, and upon the same property, does not merge or extinguish a prior one." Substantially the same view is enforced in *Flanagan v. Westcott*, 3 Stock. 264; *Davis v. Maynard*, 9 Mass. 242; *Rogers v. Traders Ins. Co.*, 6 Paige 595; *Eagle Ins. Co. v. Pell*, 2 Edw. Ch. 634.

A debt is not honestly extinguished until it is paid in cash or its equivalent; nor can a security be considered released or surrendered where no payment has been made, until some act or word of the creditor is proved, clearly manifesting an intention of relinquishing or foregoing his right.

Where a first mortgagee accepts a new mortgage and surrenders a prior one for cancellation, in ignorance of the existence of an intervening lien, equity, in the absence of laches or other disqualifying fact, will restore him to his original position. *Bruse v. Nelson*, 35 Iowa 157; 2 Jones on Mort. § 971. And so, where lands are sold under a decree founded on a first mortgage, the second mortgagee not having been made a party to the suit, in consequence of the mistake of the solicitor of the complainant, equity, for the protection of the purchaser, will treat the mortgage under which the sale was made as unextinguished, and will, on a bill by the purchaser, put the second mortgagee to his election either to redeem or be foreclosed. *Parker v. Child*,

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10 C. E. Gr. 41. These authorities render it perfectly clear that, unless it has been satisfactorily shown that the defendant intended, by the acceptance of the last security, to give up the lien of her first, the first remains in full vigor. This case is barren of all evidence of such a purpose. On the contrary, it is quite conclusively proved that her purpose in accepting the last mortgage was to get security for what was supposed to be then unsecured, and not to give up or relinquish anything.

The sum due on each of the defendant's bonds exceeds its penalty. This being so, the complainant contends that the defendant's recovery must be limited to the penalty. The rule is firmly settled the other way, not only here, but in most of our sister states. In a suit in equity for recovery of a bond debt, either upon the bond itself, or upon a mortgage given to secure the bond, the obligee is entitled to recover the full amount due, though it exceeds the penalty. *Long's adm'r v. Long, 1 C. E. Gr. 59.* This rule strictly accords with the intention of the parties to the instrument, and is in perfect harmony with the demands of justice.

The exceptions must be sustained, with costs. The defendant is entitled to a decree giving her the paramount place among the encumbrancers for all interest unpaid.

JOHN C. DANLY

v.

THE EXECUTOR OF PETER CUMMINS, deceased.

Where the interest of a fund is directed to be paid to one person for life, and the principal fund to another on the death of the first, or commissions for collecting and paying the interest must be paid out of the income, and are not chargeable against the principal.

Danly v. Cummins's executor.

On final hearing on bill and proofs.

Mr. Charles D. Thompson, for complainant.

Mr. J. G. Shipman, for defendant.

THE VICE-CHANCELLOR.

This is a suit for a legacy. The testator, Peter Cummins, directed his executor to invest one-fourth part of the residue of his estate, on good security, and pay the interest thereof annually to his daughter Julian, during her life, and, on her death, to divide the principal among certain persons, of whom the complainant is one. By the death of the life tenant the principal has become payable. No question is raised as to the complainant's right; the contest is simply as to the amount he is entitled to recover.

The defendant insists that he is entitled to be paid commissions, out of the principal fund, on the interest received and paid by him to the life tenant. No commissions were deducted from the interest, but the whole was paid over to the life tenant. Commissions on the principal fund were paid out of the general estate on the settlement of the defendant's account.

The principle laid down by the court of errors and appeals in *Holcombe v. Holcombe*, 2 Stew. 597, is, in my opinion, precisely in point. It was there held, that a life tenant must wholly bear all charges which do not go to the permanent benefit of the estate or fund, and, consequently, that a tax levied upon a fund invested for the use of one person for life, with remainder to another, must be paid out of the income of the fund. That judgment rests on the maxim, that he who gets the benefit of the fund ought to bear its burden. No distinction can be made between taxes and commissions, which, as a matter of right, will cast taxes on the income and commissions on the principal. Commissions are allowed as compensation, not only for the safe keeping of the fund, but also for receiving and paying

Danly v. Cummins's executor.

over the interest, while taxes are imposed for the protection and security given to the fund by the government who exacts them. The principle of the case just mentioned must, in my judgment, determine this.

But, it is necessary to add, this precise question has been repeatedly ruled. In *McKnight's ex'rs v. Walsh*, 8 C. Gr. 149, a testator had directed his executor to invest \$25,000, and pay the interest thereof to his daughter, Sarah, during her life, and after her death to pay the principal to her child or children. In a contest between the legatee and the executor, as to whether the latter was entitled to any commissions at all, he having retained the fund uninvested and used it in his own business, Chancellor Zabriskie held that the legatee was entitled to the principal free from commissions. Commissions were disallowed on the ground that the executor had committed a breach of trust, but the chancellor, in commenting upon the executor's rights and duties, said, that if he had properly invested the fund and collected and paid over the interest, his right to commissions would have been limited to the interest, and they could only have been deducted from the interest at the rate to be allowed had been fixed by the proper tribunal. The same judge, in *Lathrop v. Smalley's ex'rs*, 8 C. E. 192, said, that an executor holding a fund to be invested for the use of one person for life, with remainder to another, was entitled to commissions out of the yearly interest, but he had no authority to withhold any part of the interest for the payment of commissions until an allowance had been made by the proper court. And Surrogate Bradford, in *Boon v. Amerman*, 4 Bradf. 129, decided that, where the interest of a fund is directed to be paid to one person for life and the principal to another on the death of the first, commissions and taxes must be paid out of the interest, and are chargeable against the principal. He had previously enforced the same rule in *Westerfield v. Westerfield*, 1 B. 198. Where the gift is in the form of an annuity, and it clearly appears the testator intended a specific sum sh

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be paid at certain periods, clear of all imposts and charges, a different rule prevails, and, in such cases, the life tenant is not bound to submit to any diminution. *McComb's Case*, 4 Bradf. 151; *Swett v. Boston*, 18 Pick. 123; 3 Wms. on Ex'rs (6 Am. ed.) 1647.

Principle and authority are both opposed to the defendant's claim. The complainant is entitled to recover the amount of his legacy, without deduction for commissions.

FRANCES R. JONES

v.

WILLIAM H. KNAUSS.

1. A citizen of another state, who comes into this state voluntarily and without subpoena, for the purpose of giving evidence in a suit pending in this court, cannot be taken on a *ca. sa.* while he remains here as a witness.

2. His arrest, at any time while the court may require his attendance before it as a witness, is an invasion of its prerogative, for which it may discharge him.

John S. Allen was arrested, by virtue of a *ca. sa.* issued out of the Essex circuit court, while in attendance before the vice-chancellor as a witness in the above cause. He resides in Connecticut, and had come here, voluntarily, to

NOTE.—That a party to a suit or a witness is privileged from arrest while in attendance thereon, and going and returning, see cases cited in 1 Chit. Arch. Q. B. 780; 1 Tidd's Pr. 195; 1 Greenl. on Evid. §§ 316–318; 1 Whart. on Evid. § 389; 2 Phill. on Evid. (4th Am. ed.) 820. Besides these, the following instances, where such privilege was recognized, may be noticed: Where the arrest was made at a subsequent term to which plaintiff's cause had been continued (*Com. v. Huggeford*, 9 Pick. 257; *Smythe v. Banks*, 4 Dall. 329); while a defendant was returning from an appearance to a *habeas corpus* issued from a federal court, and another *habeas corpus*, issued from a state court, was served on her (*Evert's Case*, 2 Dis. 33; see *Rex v. Deleval*, 3 Burr. 1434; *Rex v. Blake*, 2 Nev. & M. 312); a service of a subpoena to answer a bill in chancery on

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give evidence. His visit had no other object. He was not served with subpoena in Connecticut or here. His examination had been concluded, the evidence on both sides closed and the argument commenced, prior to his arrest. The arrest was made in the vice-chancellor's chamber, shortly after the adjournment for the midday recess, and while the vice-chancellor was absent. The petitioner was at once after his arrest, taken from the vice-chancellor's chamber to the sheriff's office. He now applies to be discharged, claiming that his arrest was unlawful.

Mr. John A. Cobb, for petitioner.

Mr. John W. Taylor, for respondent.

THE VICE-CHANCELLOR.

The supreme court, in 1809, decided that, according to the rule prescribed by our statute (*Rev. p. 330 § 15*), a witness

a witness attending another cause (*Martin v. Ramsey*, 7 *Humph.* 260) after one arrest and bail given thereto (*Clarke v. Simpson*, 1 *McMun.* 296) ; although the second arrest was in another county (*Sailer v. Ray*, 2 *Rich.* 521) ; while attending a reference before a master in vacation (*Thayer v. Wistar*, 1 *Rich.* 134; *Hallam v. Prior*, 2 *Phil.* 65) ; while attending from another state, to hear an argument in his own case in the court of appeals (*Patterson v. Rich.* 137) ; while attending a suit in the common pleas (*Harris v. Garrison*, *Case* 142) ; after an insolvent discharge, and while returning from a session of the court, under process from the plaintiff (*Roberts v. Godwin*, 2 *Fla. Cas.* 381) ; while defendant was returning home from attendance on a suit (*Hammer v. Smith*, 7 *Fla. Cas.* 129) ; or coming voluntarily to attend it (*Solomon v. Smith*, 1 *Fla. Cas.* 129) ; or coming to court under a subpoena (*Dickinson v. Smith*, 2 *Harris* 517) ; or voluntarily attending from another state (*Roberts v. Smith*, 22 *N. C. Rep.* 16; *Mey v. Stumrath*, 16 *Gray* 80) ; or attending a suit in another state (*Payson v. Parke*, 6 *Han.* 477, 66 *N. C. Rep.* 121; *Smith v. McSpadden*, 5 *Fla. Cas.* 64; *Frost v. Brown*, 13 *Abb. F. N. S.* 297) ; even where both parties were non-residents (*Henegar v. Springer*, 24 *Fla. Cas.* 117) ; attending a police court as a prosecutor (*McIntosh v. Harris*, 2 *Fla. N. S.* 293) ; at the execution of a writ of inquiry (*Wilder v. Harris*, 1 *McMun.* 34) ; after a plaintiff's bill had been dismissed (*Adams v. Harris*, 1 *McMun.* 37) ; attending the registrar's office with his solicitor, to settle the terms of a decree (*Newton v. Adams*, 6 *Han.* 813) ; or, as a witness before a registrar in bankrupt (*Ex parte Barr*, 2 *M. D. & T. Rep.* 101) ; a husband of a petitioner, who ought to have been but was not a party to the cause (*Ex parte Britt*

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ness was not entitled to immunity from arrest while attending court, unless his attendance was in obedience to process of subpoena. *Rogers v. Bullock*, 2 Pen. 517. The witness who claimed immunity in that case was, undoubtedly, I think, a citizen of this state, and, as such, amenable to the process of our courts. If the fact had been otherwise, it was quite too important to have escaped mention by the learned reporter, who was a member of the court which decided the case. I think it may, therefore, well be doubted whether, in a case like the present, where the witness is not bound to obey the process of the courts of this state, and whose attendance cannot be compelled by compulsory means, and, if procured at all, must be voluntary, it would be held that attendance in obedience to process is necessary to immunity. An absurd purpose should not be imputed to the legislature. They certainly did not intend to deprive the suitors of this state of the testimony of witnesses residing in foreign jurisdictions; nor can it be supposed that

4 Juv. 943, 1 Mon. D. & D. 278); a bankrupt, during the forty days allowed for his examination (*Ex parte Helsby*, 1 Dea. & Ch. 16; *Ex parte Donlevy*, 7 Ves. 317; *Kimball's Case*, 2 Ben. 38, 2 Bank. Reg. 114); a defendant attending a master under a warrant to produce papers (*Franklyn v. Colqhoun*, 1 Madd. 580; *Sidgier v. Birch*, 9 Ves. 69); attending a motion against him (*Bromley v. Holland*, 5 Ves. 2); or before an arbitrator (*Moore v. Booth*, 3 Ves. 350); a common councilman summoned by the mayor of the corporation to attend an election ordered by mandamus (*Nixon v. Burt*, 7 Taunt. 682).

As to what constitutes an attendance: Merely being a suitor at the time of arrest is not sufficient (*Gray v. Ayres*, Tappan 164); a party while dining in the evening, after attending his cause all day in court, is exempt (*Lightfoot v. Cameron*, 2 W. Bl. 1113; *Newland v. Harland*, 8 Scott 70; *Atty-Gen. v. Skinners Co.*, 8 Sim. 377); a plaintiff waiting in the vicinity of the court for his cause to be called (*Childerston v. Barrett*, 11 East 439; *Walker v. Webb*, 3 Anst. 941; *Ex parte Hurst*, 1 Wash. C. C. 186); waiting *redeundo*, in a picture-shop on the way, not an unreasonable time (*Luntley v. —*, 1 Cr. & M. 579); going into a tailor-shop on his way home (*Pitt v. Coombs*, 3 Nev. & M. 212); during a detention of a month as a witness before a master (*Brown v. McDermott*, 2 Ir. Eq. 338; *Burke v. Higgins*, 2 Hogan 110; *Gibbs v. Phillipson*, 1 Russ. & M. 19); during an adjournment of the examination by the master (*Ex parte Temple*, 2 Ves. & B. 395; *Spencer v. Newton*, 6 Ad. & El. 623; *Ex parte Russell*, 1 Rose 278); a party going into another county to attend the taking of a deposition, in a suit pending, although he afterwards determine not to have it taken (*Wetherill v. Seitzinger*, 1 Miles 237);

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they intended to send the writs of our courts into jurisdictions where they would be entitled to no more force than much blank paper. In my view, it is much more reasonable to conclude they simply meant that process should be used within our own jurisdiction, where it is entitled to command respect and obedience. Much the same view has already been expressed by Mr. Justice Depue, in *Dungads. Miller*, 8 Vr. 182.

But this case presents a much more important question than a question of privilege to the witness. Was not the arrest an invasion of the prerogative of this court? It is the undoubted right of every tribunal entrusted with the determination of questions of fact, to compel the attendance of witnesses, and to hold and control them until the purposes of their attendance are fully accomplished. This power is absolutely indispensable to the discharge of these functions. The witness in this case had not been charged, and, although his examination had been com-

coming into town several days before his cause was likely to be heard (*Ex parte Tillotson*, 2 Stark. 470; *Persse v. Persse*, 5 H. of L. Cas. 671).

The following are instances where a plea of privilege was overruled. Where the witness's attendance was voluntary (*Hardenbrook's Case*, 1 Abb. Pr. 416); on service of a summons merely, without an arrest (*Ekins ads. Coburn*, 1 Wend. 292; *Pollard v. Union Pac. R. R.*, 7 Abb. (N. S.) 70; *Legrand v. Bedinger*, 4 Mon. 539; *Hunter v. Cleveland*, 1 B. 167; *Huntington v. Shultz*, Harp. 452; *Wilder v. Welsh*, 1 McArthur 56 where the defendant was in attendance as a suitor before United States land commissioners (*Page v. Randall*, 6 Cal. 32).

A common informer is not protected (*Ex parte Cobbett*, 7 El. & 955); nor a party attending court to assist his solicitor about due properly the business of the solicitor (*Flattery v. Anderson*, 6 Ir. 518); nor attending a court of bankruptcy on his own petition (*Plow v. MacDonough*, 1 DeG. & Sm. 232); as to a creditor attending to prove his claim (*Ex parte King*, 7 Ves. 312; *Ex parte Bryant*, 1 Madd. 49; *Ex parte Kerney*, 1 Atk. 55; *Ex parte Dick*, 2 W. Bl. 1142; *Kinder v. Williams*, 4 D. & E. 377); *aliter*, where the bankrupt is attending to be examined although the previous examination had been adjourned *sine die* (*Ex parte Ross*, 1 Rose 260; *Kimball's Case*, 2 Ben. 38); where a witness voluntarily leaves the place of trial, during a recess from Friday until Monday (*Rex v. Piatt*, 3 W. N. C. 187).

The privilege does not extend to criminal cases, as where the defendant had been brought into the state as a fugitive from justice (*Williams v. Bacon*, 10 Wend. 636; *Com. v. Daniel*, 4 Clark (Pa.) 49); after a d

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pleted, his further attendance had not been dispensed with. His further examination might have become necessary for the correction of his testimony, or to supply an omission arising from the inadvertence of counsel. Until discharged by the court he was subject to its order, and his arrest withdrew him from the power of the court at a time when it had a right to his presence, and while his actual attendance before the court might have been necessary for the due administration of justice. The fact that the court was not actually in session when the arrest was made, is quite immaterial; the decisive fact is, the witness was arrested while he was in attendance before the court, and while he was subject to its power and entitled to its protection. In the interim between the adjournment from one day until the next, the court does not lose its power over those who have attended before it as witnesses and have not been discharged; nor does an adjournment so far withdraw the protection of the court that, in the interval, an unscrupulous

charge on a recognizance on a criminal charge (*Moore v. Green*, 73 N. C. 394; *Key v. Jetto*, 1 Pittsb. 117; *Scott v. Curtis*, 27 Vt. 762; *Hare v. Hyde*, 16 Q. B. 394; *Jacobs v. Jacobs*, 3 Dowl. P. C. 675; *Rex v. Douglas*, 7 Jur. 39; *Anon.*, 1 Dowl. P. C. 157); or after a trial and acquittal (*Goodwin v. Lordon*, 1 Ad. & El. 378; *Addicks v. Bush*, 1 Phila. 19); or trial and conviction (*Lucas v. Albee*, 1 Den. 666); but see *Bours v. Tuckerman*, 7 Johns. 538; *Rex v. Wigley*, 7 Car. & P. 4; *Callans v. Sherry*, 11 Al. & Nap. 125; *Gilpin v. Cohen*, L. R. (4 Exch.) 131; *Benninghoff v. Howell*, 37 How. Pr. 235).

Such an illegal arrest is no cause of abating the writ (*Booraem v. Wheeler*, 12 Vt. 311; see *Hubbard v. Sanborn*, 2 N. H. 468); a prior illegal arrest from which defendant was discharged, will not prevent a subsequent legal one (*Petrie v. Fitzgerald*, 1 Daly 401; *Van Wezel v. Van Wezel*, 1 Edw. Ch. 113; *Barrack v. Newton*, 1 Q. B. 525; *Andrews v. Walton*, 1 McN. & G. 380; *Towers v. Newton*, 1 Q. B. 319; *Cartwright v. Keely*, 7 Taunt. 192; *Shults v. Andrews*, 54 How. Pr. 380; *Lagrange's Case*, 14 Abb. Pr. (N. S.) 333; *Humphrey v. Cumming*, 5 Wend. 90; *Hart v. Kennedy*, 15 Abb. Pr. 290).

As to what constitutes a deviation sufficient to forfeit the privilege, see (*Chaffee v. Jones*, 19 Pick. 260; *Salhinger v. Adler*, 2 Robt. (N. Y.) 704; *Clark v. Grant*, 2 Wend. 257; *Shults v. Andrews*, 54 How. Pr. 380; *Wilbur v. Boyer*, 1 W. N. C. 154; *Selby v. Hills*, 8 Bing. 166; *Persse v. Persse*, 5 H. of L. Cas. 671; *Pitt v. Coombs*, 5 B. & Ad. 1078; *Herron v. Stokes*, 6 Ir. Eq. 125; *Strong v. Dickenson*, 1 M. & W. 488; *Jones v. Rose*, 11 Jur. 379; *Hatch v. Blissett*, 2 Str. 986; *Ricketts v. Gurney*, 7 Price 699;

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suitors may punish them, by arrest, for giving evidence against him, or prevent them, by the same means, from giving evidence which he fears may prejudice him. If such obstructions to the course of justice were tolerated, because the court was impotent to remove them, its administration would soon be impossible.

Unless the courts can give immunity from arrest to those who appear before them to testify, and free them, at least while assisting in the administration of justice, from everything like terror and intimidation, their power is not adequate to the full discharge of the duties with which they are charged. This prerogative was said, by Judge Kane, to be founded in the necessities of judicial administration, and he held, even the service of a summons on a person who had attended before him, as an invasion of it, and set the writ aside. His judgment was approved by Chief Justice Taney and Justice Grier. *Parker v. Hotchkiss*, 1 Wall. Jr. 269. Many cases might be cited in support of the power. I refer to those only which are almost precisely analogous: *Norris v. Beach*, 2 Johns. 294; *Dixon v. Ely*, 4 Edw. Ch. 557; *Seaver v. Robinson*, 3 Duer 622.

Sidgier v. Birch, 9 Ves. 69; *Ex parte Clarke*, 2 Dea. & Ch. 99; *Mahon v. Mahon*, 2 Ir. Eq. 440; *Atty-Gen. v. Leather Sellers Co.*, 7 Beav. 157).

What amounts to a waiver of the privilege (*Stewart v. Howard*, 15 Barb. 26; *Randall v. Randall*, 6 Hill 342; *Farmer v. Robbins*, 47 How. Pr. 415; *Green v. Bonaffon*, 2 Miles 219; *Woods v. Davis*, 34 N. H. 323; *Washburn v. Phelps*, 24 Vt. 506; *Geyer v. Irwin*, 4 Dall. 107; *Tipton v. Harris*, Peck 414).

As to the proper court in which to apply for a discharge, and the proceedings thereon (*Kimpton v. L. & N. W. Co.*, 9 Exch. 766; *Pitt v. Evans*, 2 Dowl. P. C. 223; *Walker v. Webb*, 3 Anst. 941; *Bump's Bankrupt* (9th ed.) 692; *Com. v. Hambright*, 4 S. & R. 149; *United States v. Edm*, 9 S. & R. 149; *Kinsman v. Reine*, 2 Miles 200; *Fret's Case*, 1 Disn. 33; *Lyell v. Goodwin*, 4 McLean 29; *Humphrey v. Cumming*, 5 Wend. 90; *Grover v. Green*, 1aines 116; *Taft v. Hoppin*, Anth. N. P. 255; *Kimball's Case*, 2 Ben. 554, 6 Blatch. 292; *Valk's Case*, 3 Ben. 431.

That the officer making such arrest is not liable (*Cowley on Torts*, 192; also, *Moore v. Chapman*, 3 Hen. & M. 260; *Wood v. Kinsman*, 5 Vt. 588; *Carle v. Delcaldernier*, 13 Me. 363; *Nowell v. Tripp*, 61 Me. 426; see *Thurston v. Martin*, 5 Mason 497; *Kerr v. Mount*, 28 N. Y. 659; *Green v. Morse*, 5 Me. 291; *Sperry v. Willard*, 1 Wend. 32; *Gill v. Miner*, 14 Ohio St. 182) — REP.

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he petitioner was examined under an order opening the imony in this case, and giving the defendant leave to mine the petitioner and one other witness, for the purpose of proving certain newly-discovered facts. The order acted the witnesses to be examined in open court. The ure of the evidence proposed to be offered rendered it hly important that its production should be controlled the court. Had the petitioner been aware that he was le to arrest, and for that reason had refused to come e without an order giving him safe conduct, there can o doubt it would have been granted. The power and y of the court in this respect, I think, are clear. It is , such protection was neither solicited nor extended in ance of his coming; but will it be consistent with the nity and justice which should always characterize judi- conduct, to refuse to give him now, because we have testimony, the protection we would have extended to to get his testimony if it had been asked for in ance? I am very decidedly of opinion it will not.

he question presented by this motion was one of such at practical importance, in view of the *nisi prius* charac- of hearings before the vice-chancellor, that I thought it ght not to be decided without consultation with the chan- or, and I accordingly laid it before him. I am gratified be able to state that he fully concurs in the opinion that arrest of the petitioner was unlawful, and that he must, refore, be discharged.

PETER P. R. HAYDEN

v.

BENJAMIN C. DUTCHER.

An easement of light and air, supplied to the windows of one person in the premises of another, cannot be acquired in this state by a re user for twenty years under a claim of right.

Hayden v. Dutcher.

On application for an injunction, heard on bill ~~and~~ answer.

Mr. Charles Borchertling, for complainant.

Mr. George W. Hubbell, for defendant.

THE VICE-CHANCELLOR.

The decision of this case involves the solution of a simple problem: Is the doctrine of the common law of England in respect to the acquisition of an easement in light and by adverse user, in force in this state?

The complainant seeks to have the defendant enjoined from erecting a wall on his own land, which will effectually close up and render useless eighteen windows in the complainant's building, overlooking the defendant's garden. The lands are situate in the city of Newark. Though the answer denies the fact, it will be assumed, for present purposes, that the complainant's windows have existed, just as they now are, for more than twenty years prior to the commencement of this suit, and that the complainant, and those under whom he claims, have used and enjoyed them continuously, under a claim of right, without dispute, for the whole of that period. The case made by the bill puts the complainant's right to the easement in question distinctly and exclusively on the ground of adverse user. The pleadings show that the estates, which, it is contended hold to each other the relation of dominant and servient, originated in distinct and perfectly independent sources of title; the case, therefore, stands free from any claim or right to a servitude arising by implication.

There are cases, both ancient and modern, which adjudge that an easement of the character under consideration may be created by an implied covenant. It was said, in *Palm v. Fletcher*, 1 Lev. 122, decided in 1675: "If I have a house with certain lights in it, and lands adjoining, and I sell the house, but keep the land adjoining, neither I, nor any one

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claiming under me, can obstruct the lights by building on the land I retained, for, by selling the house, I sell an easement in the lights also." And Chief-Justice Holt, in 1705, in referring to *Palmer v. Fletcher*, when pronouncing judgment in *Tenant v. Goldwin*, 2 *Ld. Raym.* 1093, said: "But, if I had sold the vacant piece of ground and kept the house, without reserving the benefit of the lights, my vendee might build against my house. But, in the other case, where I sell the house, the vacant piece of ground is by that grant charged with the lights."

It would seem to be unquestionably just that such an implication should be made whenever the easement is necessary to the full use and beneficial enjoyment of the thing granted. The validity of an easement thus created was recognized in *Story v. Odin*, 12 *Mass.* 157; *United States v. Appleton*, 1 *Sumn.* 502. The pertinent maxims are: "No man shall derogate from his own grant," and "Whoever grants a thing, shall be understood to grant, also, whatever is indispensable to the full beneficial enjoyment of it."

So far as I am aware, the question under consideration is untouched by a single common law adjudication of this state, and the complainant might, therefore, very properly, be turned away simply because both his right, and the law on which he rests it, are as yet unestablished and unrecognized in such manner as to entitle him to the aid of a court of equity. But the question is not a new one in this court. It has twice been the subject of judicial consideration. First, in 1838, by Chancellor Pennington, who, in *Robeson v. Pittenger*, 1 *Gr. Ch.* 64, said that, as a general rule, in a case of ancient lights, where they have existed for upwards of twenty years, undisturbed, the owner of the adjoining lot has no right to obstruct them; particularly so if the person who built the house also owned the adjoining lot, and then subsequently sold the house, but kept the lot. He, however, admitted that the enforcement of this doctrine in populous cities, where land is very valuable, and where it is the constant practice to place buildings side by side,

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would be productive of great injustice. It is proper, also to remark, that it is quite obvious, even upon a cursory perusal of the opinion, that the conclusion reached in the case rested mainly on the idea that an easement there had been created by an implied covenant not to obstruct, rather than by adverse user.

The second case, *King v. Miller*, 4 Hal. Ch. 559, was decided by Chancellor Halsted, in 1851. No allusion made to the previous case, or to any other adjudication dictum, nor is there anything in his opinion which will justify the belief that the subject was at all considered in the light of either antecedent or cotemporaneous investigation and yet the opinion presents a very accurate epitome of the decisive considerations which have induced the tribunals of this country very generally to repudiate the doctrine. He thus combats it: "Where one has a right to put up building on the spot where he erects it, and to continue there, and the adjoining owner can do nothing to prevent its erection there, and can do nothing to prevent its remaining there, it is absurd to say that the latter can, by lapse of time, lose his right to build up to his line. A person, by making an erection on his own property, which he has right to make and continue there, and which the adjoining owner has no means of preventing, can thereby acquire a right injurious to his neighbor." The same view, in a much more amplified form, will be found expressed in *Parker v. Foote*, 19 Wend. 309; *Meyers v. Gemmel*, 10 Barb. 537; *Carrig v. Dee*, 14 Gray 583; *Ingraham v. Hutchinson*, 2 Conn. 584; *Cherry v. Stein*, 11 Md. 1; *Napier v. Bulwinkle*, Rich. 311; *Haverstick v. Sipe*, 33 Pa. St. 371; *Ray Sweeney*, 6 Reporter 74; *Sterin v. Hanch*, 17 Am. L. & Reg. (N. S.) 435 and note; *Hilatt v. Morris*, 10 Ohio St. 530; *Mullen v. Stricher*, 19 Ohio St. 135; *Morrison Marquardt*, 24 Iowa 35. And the following text writers state that the doctrine has received but a limited recognition in this country, and that even the states which, early times, gave it the most cordial recognition, have

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now either discarded it entirely or greatly modified it. *Wood on Nuisances* 152 § 153; *Washburn on Eas.* 497 § 17; 3 *Kent's Com.* 448.

The argument in exposition of the infirmities of the doctrine, is, I think, presented more forcibly by Justice Bronson, in *Parker v. Foote*, than in any opinion or disquisition that has come under my notice. Stated in substance, his argument is this: A grant may be rationally presumed where the user, if not rightful, has been an immediate and continuing injury to the person against whom the presumption is made. His property has either been invaded, or his beneficial interest in it has been rendered less valuable. If one commits a daily trespass on the land of another, under a claim of right to pass over, or feed cattle upon it, or divert the water from his mill, or throw it back upon his land or machinery, the injury is of such a character that he may have immediate redress by action; and if he stands by, acquiescingly and unresistingly, his conduct affords strong presumptive evidence that the acts done against his property were done of right. But, in the case of windows overlooking the land of another, the injury, if any, is merely ideal and imaginary. The light and air which they admit are not the subjects of grant, nor of property beyond the moment of actual occupancy. In such a case there is no adverse user, nor, indeed, any use whatever of another's property. No foundation is, therefore, laid for indulging in any presumption against the rightful owner.

The claim of the complainant might very properly be rejected at this point, not only on the authority of the judgment pronounced in *King v. Miller*, but also on the further ground that the legal principle which he must invoke to support it, is, in the almost unanimous judgment of the judicial mind of the country, opposed to reason and justice.

But another consideration remains to be adverted to. Justice Bronson, in the opinion of which conspicuous mention has already been made, says that it would be very difficult to prove that the rule in question was known to the

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common law at the time the American colonies declared themselves independent of the crown of Great Britain. A judgment pronounced by the court of queen's bench, in 1588, is reported in *Cro. Eliz.*, *Bury v. Pope*, in which it is said that it was agreed by all the justices, that if two men be the owners of two parcels of land adjoining, and one of them doth build a house upon his land and makes windows and lights looking into the other's land, and this house and lights have continued for the space of thirty or forty years, yet the other may, upon his own soil, lawfully erect a house against the other's lights and windows, and he can have no action, for it was his own folly to build his house so near to his neighbor's land; and it was adjudged accordingly. At this date, a user to raise a right by prescription, must have continued "during time whereof the memory of man runneth not to the contrary," or from the beginning of the reign of Richard I. Hence, it may be said that this case cannot be held to have decided that such right could not be created by prescription, but it may also be answered that it did not decide that it could. The first case that I have been able to find, recognizing the doctrine, is mentioned in 2 *Saund.* 175a, under the title of *Lewis v. Price*. It was decided by Wilmot J., at the Worcester spring assizes of 1761, and the right was there allowed on a user of forty years. The same judge, at common bench sitting in 1769, upheld the right on a user of fifty or sixty years. *Dougal v. Wilson*, 2 *Saund.* 175b.

The reports furnish no evidence of a decision by the court of king's bench, in which the doctrine was recognized, earlier than *Mich.*, 29 *Geo. III* (1786). In that year the right seems to have been expressly and fully recognized on a user of twenty years. *Darwin v. Upton*, 2 *Saund.* 175d. If this was the first sanction the doctrine received at Westminster Hall—and it is the first, I think, of which any reliable evidence can be found—it is clear it was no part of the common law put in force here by the constitution of July

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2d, 1776, and never constituted a part of the common law of this state.

Chancellor Bates, recently, in a very learned and vigorous opinion, attempts to show that the doctrine in question constituted part of the common law of England long prior to the American Revolution. *Clawson v. Primrose*, 15 *Am. Law Reg. (N. S.)* 6. He admits, however, it was not recognized by the king's bench, on a user of twenty years, prior to the decision in *Darwin v. Upton*, in 1786, but says, when the period of user was reduced from sixty to twenty years, as the period within which a presumptive title might be acquired to any one of the many incorporeal rights recognized by the common law, it was reduced as to all. Stated in his own language, his argument is this: "Whenever the ancient prescriptive period of immemorial user, measured at first from the reign of Richard I, as a fixed period, and afterwards by sixty years, was abandoned as to immemorial rights finally, and, in lieu of it, the rule of twenty years, by analogy to the statute of James, was adopted by judicial decisions, which applied the modified rule to any incorporeal right whatever, it became thenceforth the law of all incorporeal rights, and, as well, the law of title to the enjoyment of light and air as to any other species of right. For the rule of analogy when applied to the first species of incorporeal right which called for its application, was adopted as the law of the whole, and thus became, by judicial decision, the law of the whole." This conclusion seems to me to be a palpable *non sequitur*.

An adjudication that an adverse user of a right of way, over the lands of another, for twenty years, shall establish a presumptive right to such way, adjudges, neither as a matter of fact or law, that even a similar right, though different in name, will be upheld upon a like period of user. It may be sufficient to raise an expectation that such will be the course of judicial action, but it does not so establish the law. A right of way and a right to the enjoyment of light and air, are both, according to the English notion, properly denomi-

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nated incorporeal rights, but the distinction between the is so marked and fundamental that, it seems to me, a reasoning concerning them, based simply on analogy, must prove fallacious. The first can be acquired only by positive open acts of invasion and trespass, but the other springs from the simple use of one's own property in a lawful manner, and the mere failure of the adjacent owner to occupy his land with any sort of structure which will obscure light and obstruct air. Between such things there is no analogy and there can be no just reasoning about them by comparison.

But further criticism of the opinion is unnecessary. It is enough to say of the doctrine under consideration, it is utterly unsuited to our condition, and cannot be enforced here without producing the most disastrous consequences. It is certain, it was never directly sanctioned at Westminster Hall until after our separation from Great Britain, and it is equally clear, I think, that the view that it constituted part of the common law prior to that time, has no support whatever, except in an argument based entirely on analogy. Such evidence is quite too feeble, when it is remembered that even the ancient doctrine of prescription has never been adopted in this state (*Ackerman v. Shelp*, 3 Hal. 125; *Allen v. Stevens*, 5 Dutch. 513), to authorize the recognition of the doctrine by this court. To justify the introduction or maintenance of a rule so certain to produce mischievous results the court must be able to ground it upon something more satisfactory and more convincing than the doubtful evidence of a strained presumption.

I conclude, therefore, that the right the complainant claims is no part of the property system of this state, and that the injunction he asks must be refused, and his bill dismissed, with costs.

Warner v. Warner.

CLARA W. WARNER

v.

BEZALEEL WARNER.

1. To enable a defendant to avail himself of condonation as a defence to a suit for divorce, he must set it up either by plea or answer.

2. In case it has been omitted through mistake or unskillfulness in pleading, the court may, to prevent grave wrong, permit it to be interposed by supplemental answer, upon such terms as will afford the complainant an opportunity to disprove it.

3. Condonation is always conditional, the condition being that the pardoned party shall in the future treat the other with conjugal kindness.

4. The commission, subsequently, of any offence which falls within the cognizance of a matrimonial court, is a violation of the condition, and vitiates the pardon.

5. Evidence taken on a preliminary matter, especially before issue joined, cannot be read on final hearing, except under an order of the court.

On final hearing on bill, answer and proofs.

Mr. R. B. Seymour, for complainant.

Mr. S. H. Baldwin, for defendant.

THE VICE-CHANCELLOR.

This is a suit for divorce, founded on charges of adultery. The evidence in support of the charges leaves no doubt of their truth. Their truth is established so conclusively that I deem a reference to even the most material facts wholly unnecessary. But the proof of their condonation is almost equally strong. No such defence, however, is made by the answer. Can the defendant avail himself of it?

To enable a defendant to avail himself of condonation as a defence, he must set it up either by plea or answer. *Jones v. Jones*, 3 C. E. Gr. 34; *Smith v. Smith*, 4 Paige 432.

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Actions of divorce, like all other suits *inter partes*, are subject to that wise and salutary rule which requires that grounds of an action or a defence shall be clearly stated in the pleadings, in order that each of the parties may be distinctly informed what he is required to answer or meet, to the end that he may be afforded a full and fair opportunity to disprove whatever is alleged by his adversary, either in inculcate or in exculpation. It is an elementary rule that a defendant shall not have the benefit of a defence not disclosed by his answer, and a rigid adherence to this rule is so manifestly vital to the safe administration of justice that no consideration of policy or morals can ever justify departure from it. It is quite as indispensable to openness and fairness in the administration of justice, that a complainant shall not be defeated in the vindication of his rights, by a defence unknown to the record, and which he has not had a full legal opportunity to meet and disprove, that it is that a defendant shall not be held answerable on a cause of action of which he has never been legally informed nor required to answer.

While it is clear the defendant cannot, in the present condition of the pleadings, avail himself of the defence of condonation, it does not follow that a decree must be pronounced contrary to truth and the very right of the case. Courts of equity do not permit truth and right to be sacrificed to preserve form, nor allow justice to be defeated and wrong to triumph, on a mere mistake or unskillfulness in pleading. If necessary to the accomplishment of justice the court may yet permit this defence to be interposed by a supplemental answer, upon such terms as will afford to the complainant a full opportunity to be heard in disproof of it. That course, however, is not necessary to the doing of justice. Enough now appears in the evidence to fully demonstrate that, if this defence had been properly set up, it would not have barred the complainant's right to relief.

Condonation is always conditional, the condition being that the pardoned party shall in the future treat the other

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conjugal kindness. And by this is meant that he not only refrain from a repetition of the offence for-
i, but shall also refrain from committing any other
ce which falls within the cognizance of a matrimonial
. Chancellor Walworth at one time held a much
restricted view. He thought that nothing short of a
ition of the offence forgiven, or the doing of an injury
m generis, should operate as a revival of the first
son v. Johnson, 4 Paige 460); but this view was disap-
d by the court of errors of New York, where, in the
case on appeal, it was said: "The good sense of the
tion which accompanies condonation is, that the
ling husband shall not only abstain from adultery, but
in the future, treat his wife with conjugal kindness.
e, cruelty is a breach of the condition and revives
ery." 14 Wend. 643. The contrary doctrine would
r condonation practically unconditional; for, if a new
try must be proved to revive the first, the revival is of
lue or importance; for, in establishing the fact neces-
o revival, a new and independent cause of action is
ished, sufficient for all purposes of justice and relief.
ule first stated is supported by sound policy and good
, and is now the accepted doctrine of the English
s, and has been uniformly followed in this country,
ever occasion has arisen for its application, except in
istance already mentioned. *Durant v. Durant*, 3 Eng.
23; *D'Aguilar v. D'Aguilar*, Id. 329; *Popkin v. Pop-*
kin, 1. 325; *Bramwell v. Bramwell*, 5 Eng. Ec. 241; *Wors-*
Worsley, 6 Eng. Ec. 249; *Eldred v. Eldred*, 7 Eng. Ec.
Palmer v. Palmer, 2 Sw. & Tr. 62; *Dent v. Dent*, 4 Sw.
105; *Johnson v. Johnson*, 1 Edw. Ch. 439; *Hoffmire v.*
ire, 3 Edw. Ch. 174, S. C. on appeal, 7 Paige 60; *Odom*
om, 36 Ga. 286; 2 Bish. on Mar. & Div. § 63.

e evidence leaves no room to doubt that the defendant
iolated the condition on which his pardon was granted.
he was pardoned, he has carried on a secret corres-
ence, under a fictitious name, with the woman with

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whom he had been criminally intimate; he has also furnished her with money, and made her presents, and visited her without the knowledge of his wife. When his wife threatened to have his paramour arrested, he concerted measures for her protection. Indeed, it is impossible to believe, in view of the defendant's conduct, that his lascivious relations with his associate in guilt were ever entirely broken off. His treatment of his wife has been the very opposite of conjugal kindness, and deprives him of all right to plead her pardon as a bar to her suit.

It is proper to add, that the defendant, by his answer, in addition to a denial of the charges made against him, pleads counter-charges. He says his wife has also been guilty of adultery. No attempt has been made, since his answer was filed, to prove the truth of these charges. In the proofs taken before answer, on the question as to which of the parties should have the custody of the children pending the suit, some testimony was given having a tendency to support the truth of one of these charges, but the complainant, by her own oath, in that proceeding, either denied or explained every accusing fact or circumstance. She was a competent witness on the question then before the court. Evidence taken on a preliminary matter, especially before issue joined, cannot be read on final hearing except under an order of the court. *Holcombe v. Holcombe*, 2 Stock. 285; *Underhill v. Van Cortlandt*, 2 Johns. Ch. 3. No such order was applied for, nor was the testimony read on final hearing, nor has it been considered. In the proceeding before the court in which the incriminating evidence was taken, the complainant could, with safety, rely on the counter-evidence furnished by her own oath, but the situation is now entirely changed; her evidence is not competent on the issue now before the court, and, if the other is admitted, it will stand undenied and unchallenged. For this reason, had an application been made at the final hearing to admit it, it must have been rejected altogether, or only granted on such terms as would have afforded the co-

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plainant a reasonable opportunity to disprove it. Until made evidence on *the* issue of the suit, the complainant had a right to understand that it could not be used on final hearing.

The complainant is entitled to a decree.

CAROLINE VREDENBURGH

v.

WILLIAM H. BURNET and others.

1. Priority of record will not give a right of preference in payment to one of two concurrent mortgages, if both are held by the same person.

2. If one of the two is assigned by the mortgagee, upon a representation that it is the first lien upon the premises, such representation will make it so as against the assignor.

3. But as against a subsequent assignee of the other, without notice, such representation is a secret equity by which he will not be bound.

4. An assignee of a mortgage takes it subject to all the defences which the mortgagor, or those who have succeeded to his rights, may urge against it, but free from secret equities created by the mortgagee in favor of third persons.

5. Whatever puts a party upon inquiry, amounts, in judgment of law, to notice, provided the inquiry became a duty, and would, if pursued, have led to a discovery of the requisite fact.

On final hearing on bill, answer and proofs.

Mr. Aram G. Sayre, for complainant.

Mr. Joseph Coult, for defendant.

THE VICE-CHANCELLOR.

The only point disputed in this case is, which of two mortgages is entitled to be first paid. They were both made

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May 20th, 1871, by the same mortgagor, to the same mortgagee, and cover the same premises. Both have since been assigned. That now held by the complainant was assigned May 22d, 1871, and recorded the next day, May 23d; the other was recorded May 22d, 1871, and remained the property of the mortgagee until August 21st, 1873, when he assigned it to the defendant, William H. Burnet.

Both mortgages having been executed at the same time and both being the property of the same person at the time the one now held by the defendant was recorded, the fact that one was recorded on one day and the other on the next, did not change them from concurrent to successive liens. Priority of record will not give a right of preference in payment to one of two concurrent mortgages, if both held by the same person. Though recorded at different times, they still remain concurrent liens. *Gausen v. Tinslon*, 8 C. E. Gr. 406. Such mortgages are not within either the letter or policy of the registry acts; they provide simply for successive liens, not concurrent. They are a matter of notice, their principal design being to give each successive mortgagee notice of what burdens precede his; where two mortgages are taken at the same time, by the same person, on the same lands, recording them will inform him of nothing he does not already know. To protect himself against liens subsequently acquired, he must make them matters of record; but it is not possible for him, by recording one before the other, to raise against himself a sufficient right or equity to be the fit subject of the protection of the law. If, on a sale of the mortgaged premises, a sum sufficient to pay both is not raised, his loss must be the same, whether he leaves them as they are, concurrent liens, or attempts to treat them as successive liens. Up to the time the mortgagee assigned the one now held by the complainant, both mortgages unquestionably held equal rank and were entitled to be paid concurrently.

Their position has, however, since been changed. The mortgagee testified that, at the time he negotiated the

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of the one now held by the complainant, he was informed by the person who negotiated the purchase that the moneys he held for investment were trust funds, and he would purchase nothing but a first mortgage. He says he thereupon stated that the mortgage he wanted to sell was a first mortgage. This, undoubtedly, as between the mortgagee and any subsequent holder of that mortgage, gave it the superior rank as against the mortgage he retained. His representation invested the mortgage he sold with an equity, as against the one he retained, that he would never be permitted to question or destroy. But does his assignee stand, in this respect, where he does? In other words, did the defendant acquire title to his mortgage charged with the equities to which it would have been subject in the hands of his assignor? The established doctrine of this court is, that the assignee of a mortgage takes it subject to all the defences which the mortgagor, or those who have succeeded to his rights, may urge against it, but free from latent or secret equities, created by the mortgagee in favor of third persons. *Losey v. Simpson*, 3 Stock. 254; *Woodruff v. Depue*, 1 McCart. 175; *Lee v. Kirkpatrick*, Id. 264; *Starr v. Haskins*, 11 C. E. Gr. 415; *De Witt v. Van Sickle*, 2 Stew. 212; *Putnam v. Clark*, Id. 415. A concealed defect or secret equity, arising from the conduct of those who previously owned the property, of which the purchaser had no notice, cannot be set up against him. *Danbury v. Robinson*, 1 McCart. 219. Where two persons holding successive mortgages, recorded in the order of their execution, agree, by writing, that the first shall stand second in order of payment, and the holder of the one made second by the agreement subsequently assigns it to an innocent purchaser for value, upon a representation that it is first in order of priority, such agreement is a latent or secret equity, and is without force against a *bona fide* assignee. No caution or diligence which it is possible for the most careful purchaser to exercise, will enable him to discover a secret arrangement of this nature, and, unless notice of it is brought home

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to him, he will not be bound by it. *N. Y. Chemical M₂ Co. v. Peck*, 2 *Hal. Ch.* 37. A contrary rule would render mortgages practically inalienable. No such consequence however, attend the other branch of the rule, for it is always easy for an assignee, before purchasing, to inquire of the mortgagor, or of those who have succeeded to his rights, whether or not its validity will be disputed.

When the equity resides in the debtor, it may be easily discovered by the exercise of ordinary caution; but when it resides in a stranger to the transaction which gave birth to the mortgage, and does not appear in the papers, nor in the records, its discovery, if possible at all, is a pure matter of chance. Unless it has been shown that the defendant was, at the time of his purchase, chargeable with notice of the arrangement by which his mortgage was made subordinate to that of the complainant, it is clear, I think, that he holds his mortgage free from any equity created by this arrangement.

Did the defendant have such notice? The mortgage premises consist of two city lots, lying adjacent, one with dwelling on it and the other vacant. The defendant says that, at the time he purchased his mortgage, the mortgagee told him that the mortgage now held by the complainant was the first lien on the dwelling-house lot, and that the other mortgage was the first lien on the vacant lot. This constituted, at least, partial notice of the arrangement. Both mortgages were then matters of public record; the defendant must be charged with notice of every fact properly constituting part of the record, and he must, also, be assumed to have known what the law was. When, therefore, he was informed that the mortgage now held by the complainant was the first lien on the dwelling-house lot, and that the other was the first lien on the vacant lot, he was bound to understand that an arrangement had been made between the parties, subsequent to the execution of the papers, different from that which existed between them in force of the papers. Without such information, he had

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right to rely upon the papers. Looking simply at them, or at the record of them, he had a right to understand that the mortgages stood as concurrent liens; but when he was informed that they had ceased to hold to each other the relation which the law would assign to them, and that their position had been changed from concurrent to successive liens, as to certain portions of the mortgaged premises, by agreement of the parties, he received sufficient notice of the arrangement under which the complainant claims, to put him upon inquiry, and to make it his duty to apply for further information. The mortgagor was his copartner. He had always paid the interest for the mortgagor on the complainant's mortgage, and when he was informed that the original position of the mortgages had been changed by agreement, he knew just where to apply for full information. If he chose to refrain from doing so, and to purchase, relying entirely upon the representations of his assignor, I think he has no right to ask the complainant to bear the consequences of his own folly. He admits notice of the arrangement; he complains simply because he did not know that it was understood that the complainant's mortgage should be the first lien on the vacant lot as well as the other. Notice of any part of the arrangement was sufficient, in my judgment, to put upon him the duty of seeking full information of the holder of the other mortgage, and, if he failed to perform it, and loss ensued, he must bear it as the consequences of his own fault. Whatever puts a party upon inquiry, amounts, in judgment of law, to notice, provided the inquiry became a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding. *Hoy v. Bramhall*, 4 C. E. Gr. 572.

The complainant's mortgage must be adjudged the first lien on the whole of the mortgaged premises.

Noe's administrator v. Miller's executors.

JOHN NOE, administrator of ELIZABETH M. NOE, deceased,

v.

THE EXECUTORS OF ISAAC MILLER, deceased.

1. Under a bequest "to A. and his heirs," A. usually takes the whole absolutely; but if it be "to A. and his children," the children take with their parent.

2. Under a bequest to two or more persons, by name or as a class, without more, they take as joint tenants; but slight evidence of an intention on the part of the testator to confer distinct interests, will make them tenants in common.

3. Testator gave his daughter E. one-twelfth of his estate, directing that it should not be subject to the control of her husband, but should be hers and her child's or children's.—*Held*, that the daughter took a life estate, with remainder to her children.

4. When a suit is necessary in the proper administration of a fund given by will, its costs and a reasonable counsel fee may be allowed, out of the fund, to a suitor who makes an unsuccessful claim to the fund.

On final hearing on bill, answers and proofs.

Mr. William P. Wilson, for complainant.

Mr. F. W. Stevens, for defendant.

THE VICE-CHANCELLOR.

This is a suit for a legacy. The complainant rests her right to recover on a bequest made to his intestate, Elizabeth M. Noe, by her father. Her father died August 8th, 1869, and she, September 1st, 1874. She left two children, both born in the life-time of her father, one before he made his will and the other after. The will directs that, after the testator's estate shall have been converted into money, shall be divided into twelve shares, and then disposes of the several shares. The gift made to the complainant's intestate is in the words:

"I do give unto my daughter, Elizabeth M. Noe, wife of John N one share in addition to what she has already had, her said husband

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not to have any control of said legacy, but to be hers and her child's or children's forever; but, in case she should die, leaving no child or children, the said legacy may be claimed by my other children, according to the tenor of my will."

If the testator had omitted the words, "but to be hers and her child's or children's forever," his meaning would have been entirely free from doubt. Under a bequest thus expressed, his daughter would have taken a vested interest in the subject of the bequest, which could only have been defeated by her death without leaving a child surviving her. But this is not the form of the bequest. The testator has manifested, by clear words, that he intended the children, as well as the mother, should participate in his bounty. In construing a will, its language must be understood according to its plain and ordinary sense, and the will must so read as to give effect, if possible, to every word. Here, in the first instance, the gift is made to the daughter absolutely, and to the exclusion of everybody else, but the testator immediately adds that the subject of the gift shall be hers and her children's forever. Substantially the same intent would have been expressed if he had said, "I give the legacy to my daughter for the exclusive benefit of herself and her children." When a legacy is given "to A. and his heirs," the word "heirs" is usually understood to have been used to indicate the interest or quantity of estate intended to be given to A.; in other words, that he shall take the whole interest absolutely. *Ex'rs of Wintermute v. Ex'rs of Snyder*, 2 Gr. Ch. 424; *Crawford v. Trotter*, 4 Madd. 192. But when the gift is "to A. and his children," the word "children" is generally understood to be descriptive of persons who are to take as legatees, and, under a bequest in this form, the children take with the parent. *Ex'rs of Mason v. M. E. Church at Tuckerton*, 12 C. E. Gr. 47.

There can be no doubt that the testator intended the children of his daughter Elizabeth should, by force of his will, take some interest in the share he gave their mother, but precisely what, it is very difficult to define. It is very

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probable he did not himself have a very clear idea of ~~prec~~isely what he intended to give to them; if he did, ~~it~~ is certain he has not expressed it. The duty of the court ~~s~~ in such cases is always difficult. They are required to ~~tell~~ what the testator meant when he did not know himself, ~~and~~ where he has left nothing but the most doubtful and ambig-
uous or conflicting traces of a purpose still in a nebul ~~ous~~ state, and this they are required to do in cases where ~~large~~ property interests must pass by their judgment.

What estate or interest did the several legatees take ~~un~~der this bequest? Did they all take a right to the ~~pres~~ent enjoyment of the legacy, either as joint tenants or ~~tenants~~ in common, or did the mother take only a life estate, ~~w~~ith remainder to her children? Where a legacy is given to ~~t~~wo or more persons, by name or as a class, without more, ~~they~~ take as joint tenants (*Westcott v. Cady*, 5 Johns. Ch. 348; *Hark. on Wills* 111; 2 Jarm. on Wills 158; 2 Kent Com. 350), but, in a grant or devise of land, express words ~~are~~ necessary to create a joint tenancy. (*Rev. p. 167.*) And ~~i~~n a bequest of personalty, slight evidence of an intention ~~to~~ to confer distinct interests will operate as a severance, ~~and~~ then the legatees will take as tenants in common. As, for example, if the language of the bequest is, that A. and ~~his~~ children shall take equally, or by shares, or if the ~~testator~~ employs any other words indicating distinction or ~~plura~~lity of interests, in all such cases the legatees will take as ~~tenants~~ in common. *Hark. on Wills* 112; 2 Jarm. on Wills 162. In this case, the gift is to the mother and her children, ~~wit~~h out more; there is nothing to lay hold of to change the ~~c~~onstruction from that which the law fastens upon it. If the mother and children both acquired a present right of ~~en~~joyment, I think it must be held they took as joint tenants ~~and~~ not as tenants in common.

Did they all take a right to the present enjoyment of ~~the~~ legacy, or did the mother take a life estate, and the children ~~en~~ in remainder? This question is of no practical importan ~~ce~~ to the complainant, for, inasmuch as it has already ~~been~~

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cided that the legatees took as joint tenants (and, consequently, whatever interest resided in the mother while alive, passed, immediately on her death, to her children), it is clear cannot, as the representative of the mother, maintain this action. But it is a question that will, perhaps, require solution at some future time. All persons having any interest in it are now before the court; the children, and the complainant as their guardian, as well as the executors, are here; they have been fully heard; under these circumstances, it is quite obvious, I think, that it is the duty of the court, in the interests of peace and economy, and to protect its wards against needless litigation, to decide it now. Bequests expressed in the form of the one under consideration, have usually been construed to give a life estate to the parent, with remainder to the children. The only cases holding that parent and children, under a similar bequest, both take a right of present enjoyment, which have come under my observation, are *De Witte v. De Witte*, 11 Sim. 40; *Bustard v. Saunders*, 7 Beav. 92; *Beales v. Crisford*, 3 Sim. 592, and *Ackerman v. Burrows*, 3 Ves. & B. 54. The bequest construed in *Bain v. Lescher*, 11 Sim. 397, was identical in substance, and almost in form, with that presented for construction in this case. The testator there, in the first instance, made direct and exclusive gifts, in absolute terms, to six persons, three males and three females, and then added: "And I direct that the legacies given, by the present will, to females, shall be for their own benefit and their children, and shall never be subjected to the control of their respective husbands." Vice-Chancellor Shadwell held that the parents each took a life estate, with remainder to their children. A like construction, of bequests more or less similar, was adopted in *Newman v. Whittingale*, 1 Cox 341; *Crawford v. Trotter*, 4 Madd. 192; *Frey v. Honeywood*, Id. 398; *Morse v. Morse*, 2 Sim. 485; *Rugham v. Marquis of Headfort*, 10 Sim. 639; *French v. French*, 11 Sim. 257; *Crockett v. Crockett*, 2 Phil. 553, and *Card v. Pelouët*, 2 Stock. 304.

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Most of these cases were decided by a simple express of opinion, without any attempt by the judge to give course of reasoning by which he reached his conclusion. The construction adopted, however, seems to me to be reasonable and just. I think it is much more natural and reasonable to conclude, where a father makes a bequest of a particular sum or fund to a child, and also to the children of such child, jointly, without indicating in any way when their enjoyment shall commence, that he intends the parents shall have simply the income or produce during life, and that the principal shall go to the children on the death of their parent, than that he meant that his grandchildren should share equally with their parent at once, and have right to demand a division of the fund as soon as it is payable. I, therefore, hold, in accordance with what I deem the decided weight of authority, that, by the proper construction of this bequest, the complainant's intestate took life estate in the legacy, and her children the principal remainder.

Shall the complainant pay costs, or be allowed costs out of the fund in dispute? Where the true construction of will is involved in doubt, so that two or more persons may fairly make adverse claims to the same fund, either may resort to a court of equity for an interpretation, and, though his claim may be pronounced invalid, he may still be entitled to costs and a reasonable counsel fee out of the fund. The litigation, in such a case, is indispensable to the proper administration of the fund, and it should, therefore, be the costs of the litigation as part of the expenses incident to its administration. *Attorney-General v. Moore's ex'rs*, 4 C. Gr. 503. A suit in this case was necessary and proper indeed, unavoidable; all persons having any interest in the fund, have been made parties, and have been afforded opportunity of being fully heard. A decision of the complainant's claim practically settles the rights of all parties and leaves nothing for future dispute. He should, therefore, I think, be allowed his costs and a reasonable counsel fee out of the fund.

CASES
ADJUDGED IN
THE PREROGATIVE COURT
OF
THE STATE OF NEW JERSEY
MAY TERM, 1879.

THEODORE RUNYON, Esq., ORDINARY.

THE UNION NATIONAL BANK OF FRENCHTOWN, appellants,

v.

ISRAEL POULSON and others, administrators &c., respondents.

1. Creditors, although they had obtained judgment against administrators, were not, previous to the adoption of *Rule 11* of the orphans court, entitled to notice of an application by such administrators to be discharged from their trust, on account of the insolvency of themselves and their sureties.

2. A discharge for such cause is not invalid because granted before an account rendered, since such discharge does not relieve from that duty.

On appeal from a decree of Hunterdon orphans court.

Mr. J. N. Voorhees, for appellants.

Mr. J. G. Shipman, for respondents.

Union National Bank of Frenchtown v. Poulson.

THE ORDINARY.

On the 21st of January, 1878, the orphans court of Hatterdon county, by their order of that date, on the petition of Israel Poulson and William J. Poulson, administrators of the estate of Samuel B. Hudnit, deceased, discharged them from the further performance of their duties as administrators, except accounting for and paying over moneys or assets received by them, or either of them, in virtue of their office of administrators. On the same day the court appointed Edward P. Conkling administrator in the stead of the Poulsons. The appellants, the Union National Bank of Frenchtown, are creditors of the deceased. In 1877, they recovered judgment for their debt, against the Poulsons, as administrators. They seek to reverse the order of discharge, on the ground that they had no notice of the proceedings; that there was no petition before the court, and that the court did not require the Poulsons, who had never accounted, to account before they were discharged.

The statute under which the proceeding complained of was taken (*Rev. p. 780, Orphans Court, § 125*), makes no provision for notice. The rules of the orphans court (*Rule 1*, promulgated by the ordinary in June, 1878, subsequent to the proceeding under review, do.

The appellants insist that their position was such, as a reason of their judgment against the administrators, that they were especially entitled to notice. But their judgment gave them no preference over other creditors of the estate, and, if they were entitled to notice, then all the creditors, however numerous they may have been, were, also. There appears to have been no notice to any one. But the rights of the creditors were not affected by the discharge. The liability of the Poulsons to account was unaffected by it. On the petition, it was eminently proper, and manifestly in the interest of the creditors, that they should be discharged. The petition was duly verified by the oath of one administrator and the affirmation of the other, and stated that

Union National Bank of Frenchtown v. Poulson.

Poulsons were appointed administrators in February, 1873, and thereupon entered upon their duties as such; that three of the sureties on their administration bond had become and were entirely insolvent, and that they could not conveniently furnish new sureties in their stead, and that the appointment of administrators in their place would be greatly to the advantage of the estate.

The court, by their order of discharge, declare that they had examined into the matter, and considered the application, and were satisfied that there was sufficient reason for the discharge, and that it would not be prejudicial to the estate or those interested therein, and that it ought to be granted. The circumstances before the court were of themselves sufficient to justify the discharge. The estate was a very large one. It had been in the hands of the Poulsons, for administration, about five years. They had never accounted. They declared that the estate was insolvent. Three of their sureties had become insolvent, and they not only could not conveniently find others, but were unwilling to do so.

The appellants say, in their petition of appeal, that the Poulsons had possessed themselves of large amounts of cash, by converting assets of the estate into money, and had improperly and illegally applied the money, and had so ruinously and improperly mismanaged the estate that it had become insolvent.

The rights of creditors were in nowise affected injuriously by the action of the court. It is urged that the appellants had a right to have an account from the Poulsons before they were discharged, and that the court ought to have required such account before discharging them. But, as before remarked, the liability to account is not affected by the discharge, and, if the statements of the petition are true, it would have been highly improper for the court to retain the Poulsons in office until they should have accounted, after the fact became known, by the petition,

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that the security on the administration bond had become greatly impaired.

Nor can the objection, based on the want of a petition as the foundation of the order, be sustained. The order declares that the petition was presented on the 7th day of January, 1878, and it is apparent, from the recitals of the order, that it was before the court. The petition was sworn to on the day last mentioned, and, though it appears to have been marked as having been filed on the 4th of March, 1878, and the record shows that it was ordered by the court that it be filed as of the 7th of January in that year, it by no means follows that it was not presented to the court on the day when the order of discharge was made. On the contrary, the recital of the order in that respect, and the presumption in favor of the regularity of the proceedings, are fatal to the objection.

The order will be affirmed, with costs.

ABRAHAM MANDEVILLE and others, appellants,

v.

JANE PARKER and others, respondents.

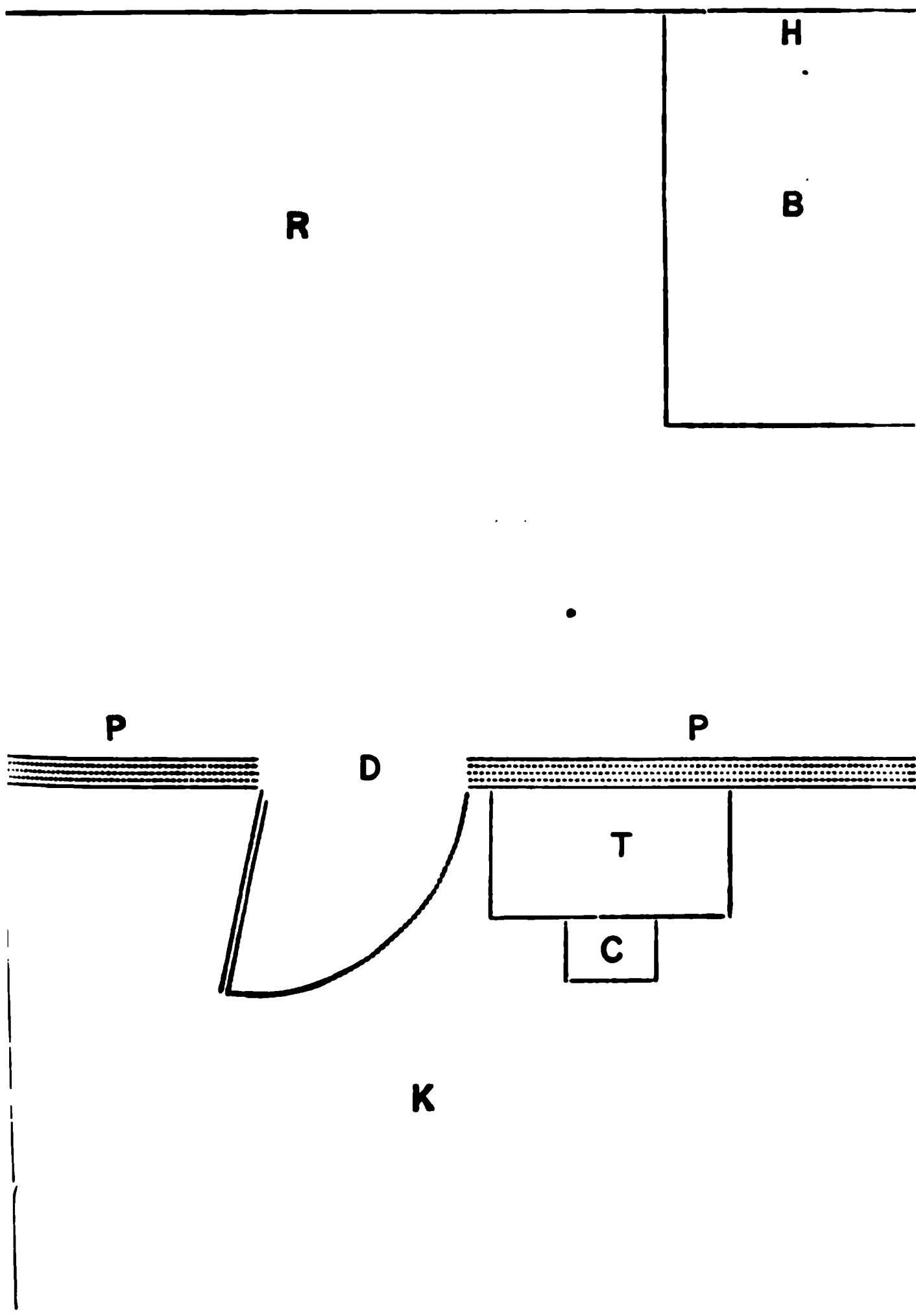
The witnesses to a will signed in a room adjoining that in which the testator lay. Between the rooms there was a door partly open, so that the testator could not see them sign.—*Held*, not to have been a compliance with the statute which requires that the witnesses sign in the presence of the testator.

On appeal from decree of Morris orphans court refusing probate of a paper writing purporting to be the last

NOTE.—The rule is established in New Jersey, that the signing of a will by witnesses to a will must be done in the testator's presence. *D. Allen, Pen. 35, 43; Mickle v. Matlack, 2 Harr. 86, 96, 116.*

The following cases show what has been deemed a sufficient signing in the presence of the testator:

In *Shires v. Glasscock, 2 Salk. 688, Carth. 81*, the witnesses with



- B—Bed where testator lay.**
- C—Chair where witnesses sat while attesting will.**
- D—Door between bed-room and kitchen, partly open.**
- H—Position of testator's head.**
- K—Kitchen.**
- PP—Partition wall between rooms.**
- R—Bed-room.**
- T—Table at which witnesses sat while attesting will.**

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and testament of Jacob G. Mandeville, deceased, late of that county.

Mr. A. W. Bell and *Mr. Theodore Little*, for appellants.

Mr. A. Mills, for respondents.

THE ORDINARY.

On the 14th day of March, 1874, Jacob G. Mandeville executed an instrument of writing as his last will and testament. It was drawn by Benjamin Roome, a scrivener, for whom he had sent. The testator signed it with his mark (he had, to a very great extent, lost the use of his right arm and hand, through an accident), in the presence of Mr. Roome and Mr. William D. F. Merrick, a neighbor who had been sent for to witness the will. The testator, at

into a gallery and there subscribed the will. Between the gallery and the bed-chamber where the testator lay, there was a lobby with glass doors, and the glass broken in some places, and the testator could, through the broken glass, have seen the table where the witnesses signed.

In *Dary v. Smith*, 3 Salk. 395, 12 Mod. 37, the testator lay in a bed in one room, and the witnesses went through a small passage into another room, and there, at a table opposite the door (both doors being open), wrote their signatures; it being possible for the testator to see their acts; and, *semble*, good, if in the same room where the testator lies, although the bed-curtains be drawn close. *Ib.*; also, *Longford v. Eyal*, 1 P. Wms. 740, and *Newton v. Clarke*, 2 Curteis 320.

In *Todd v. Winchelsea*, Moo. & M. 12, 2 Car. & P. 488, 3 Russ. 441, the will was taken into an adjoining room, the door left open, and a person lying where the testator did could see a small part of the adjoining room, in which there were two tables, one commonly used as a writing-table, and generally standing out of sight as to testator's position; the other, also movable, whose position was not shown. The witnesses did not remember on which table the will was attested. Also, *Percy's Case*, 1 Roberts. 278.

In *Casson v. Dade*, 1 Bro. C. C. 99, Dick. 586, the carriage of testatrix was in such a position that she might have seen, through the window of the carriage and of the office, the witnesses signing her will within the office.

In *Trimmell's Case*, 11 Jur. (N. S.) 248, one witness signed in testator's presence, and the other, in order to sign, withdrew, at his request, into an adjacent room, and signed at a table where he could have been seen by any one sitting up in testator's bed, the testator being physically able to do so, and the doors of both rooms being open.

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the time, was in his last illness. He died the next day. He lay in his house, on a bed in a small bed-room in the rear of the kitchen, and separated therefrom by a partition wall in which was a door. The bed was in the northeast corner of the bed-room; the partition was on the south of the bed-room, and the door, at its nearest point, was about eight or nine feet distant from the head of the bed. The testator, lying in the bed, could see a person standing at the door. The door opened outwards into the kitchen. In the kitchen, standing sidewise against the partition, and entirely out of sight from the place where the bed stood, was a table, with a leaf on each side. The door was partly open. The witnesses, after the testator had signed and declared the will, took the paper out of the bed-room into the kitchen, and on that table signed their names. The paper was not afterwards taken or shown to the testator, but was

In *Wright v. Lewis*, 5 Rich. 212, the testator, being in ordinary health after executing his will on a piazza near a door, left his seat to be occupied by the witnesses while subscribing their names, and stepped into and remained in an adjoining room, from which he might have seen the attestation, although none of the witnesses pretended to know where he was when they signed, nor could he have seen them from the seat he was occupying when they immediately afterward went into that room.

In *Ray v. Hill*, 3 Strobb. 297, the witnesses, when signing, were near to the testator, a blind man, that he could have heard the scratching of their pens.

In *Tucker v. Oxner*, 12 Rich. 141, when the witness rose from the table where he had been attesting her will, the testatrix, whom he had not noticed before, was standing in a doorway leading into another apartment, and looking towards him. [The decision, however, went off on another point.]

In *Bynum v. Bynum*, 11 Ired. 632, the witnesses signed at a table near the head of a bed where the testatrix was lying very sick; she could see the table and their arms, but perhaps not the paper on which the will was written.

In *Cornelius v. Cornelius*, 7 Jones 593, the table was on the testator's left side, seven or eight feet away, and a little back of where he was lying, but he could have seen the pen and paper by turning his head half over, which he was physically capable of doing—and one witness said he observed that the testator did once turn his head during the attestation.

In *Hill v. Burge*, 12 Ala. 687, the testator was lying in bed with head propped up and averted from the attesting witnesses, but turning his head he could have seen them, although some of the

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handed, after the witnesses had signed it, to the testator's wife, by the scrivener. The orphans court of Morris county refused to admit the paper to probate, on the ground that it was not attested by the witnesses in the presence of the testator.

I am satisfied, from the evidence, that the testator was of sound and disposing mind when the will was made, and that it was his free act.

Objection is made to the publication, on the ground that it appears to have been made before the will was signed, and that it was a mere acknowledgment by the testator of the instrument "to be his hand and seal for the uses and purposes therein mentioned and expressed." The testimony shows clearly that he acknowledged it to be his last will and testament. Both of the witnesses say so, and it is evident that that was his language from the fact that, at first,

while attesting, had their backs toward him. See, also, *Pope v. Pickett*, 51 Ala. 584.

In *Moore v. Moore*, 8 Gratt. 307, four judges were equally divided on the question of the validity of an attestation made in a passage-way adjoining the room where the testator lay. He could not have seen them while lying down, but by leaning over the foot of the bed or by getting out of it, either of which he had strength to do, he could have seen them.

In *Sturdivant v. Birchett*, 10 Gratt. 67, three out of five judges held that an attestation made in an adjoining room, in such a position that it was impossible for the testator to see the act, would be validated by their acknowledgment of the genuineness of their signatures, made immediately afterwards to the testator.

In *Nock v. Nock*, 10 Gratt. 106, the witnesses signed, at a bureau, in an adjoining room, sixteen or seventeen feet from the bed where the testator was lying with his head raised up, and from which he could, through an open door, plainly see the witnesses, excepting their fore-arms and hands, while writing.

In *McElfresh v. Guard*, 32 Ind. 408, the will, after execution by the testatrix, was taken into an adjoining room and attested by the witnesses at a stand or desk, in a position where she might have seen them through a door which stood open.

In *Turner v. Cook*, 36 Ind. 129, the witnesses attested the will on a table in a corner of the testator's room, opposite to where he lay, with nothing intervening. See, also, *Bundy v. McKnight*, 48 Ind. 502, 509.

In *Mason v. Harrison*, 5 Harr. & Johns. 480, the testator was sitting up in bed with his back towards the witnesses while they were signing in the same room, in a place where he could have seen them by turning his head, and this he was capable of doing.

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and until an explanation was made to him, he declined to acknowledge that it was his last will because it was the ~~first~~ he had ever made, and also because he might get well and make another. If the publication was made before the testator signed, it was a sufficient compliance with the provision of the statute in that respect. *Mundy v. Mundy*, 9 *McCart*. 290; *Errickson v. Fields*, 3 *Stew*. 634.

But I am satisfied, from the evidence, that the provision of the statute which requires that the witnesses sign in the presence of the testator, was not complied with. The certificate of attestation declares that the witnesses signed in the presence of the testator, and that fact throws the burden of proof to the contrary on the opponents of the will. *Tappan v. Davidson*, 12 *C. E. Gr.* 459; *Allaire v. Allaire*, 8 *Vr.* 31, 32, *S. C. in error*, 10 *Vr.* 113. There is no evidence that the witnesses signed in the presence of the testator, but the

In *Butler v. Benson*, 1 *Barb.* 526, 530, an attestation in the testator's presence was deemed still necessary under the New York statute. But see *Lyon v. Smith*, 11 *Barb.* 124; *Ruddon v. McDonald*, 1 *Bradf.* 35, 36; *Vernam v. Spencer*, 3 *Bradf.* 16, 20.

In *Ambre v. Weishaar*, 74 *Ill.* 109, the testatrix was sitting in her bed, propped up, and could have seen the witnesses while signing in the next room, the door between the rooms being open, and a straight line from her position through the doorway striking about the centre of their table.

In *Meurer's Case*, 44 *Wis.* 392, the testator, during and after executing his will, sat up in his bed, and from that posture could plainly see the witnesses attesting his will in the next room, through an open doorway.

The following are instances of what has been deemed not a sufficient signing in the testator's presence:

In *Edelston v. Sprake*, *Holt* 222, 3 *Mod.* 259, *Comb.* 156, the witnesses subscribed their names in a hall adjoining the room where the testator lay, but in such a place that he could not see them.

In *Machell v. Temple*, 2 *Show.* 288, the witnesses withdrew out of sight into another room, at the request of the testator, because the noise in his sick-room disturbed him.

In *Broderick v. Broderick*, 1 *P. Wms.* 239, 4 *Vin. Abr.* 534, the witnesses, for the ease of the testator, went down stairs into another room to attest his will. See, also, *Onions v. Tyrer*, *Id.* 343.

In *Clark v. Ward*, 1 *Bro. P. C.* 137, the witnesses subscribed at a window in a passage-way, where they could see but part of the bed, and the testator, lying thereon, could not see them.

In *Tribe v. Tribe*, 13 *Jur.* 793, 1 *Robt.* 775, the testatrix lay in bed with the curtains drawn, and her back turned toward the witnesses, who were signing at a table in the same room.

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proof is to the contrary. The most that is said in support of the attestation is, that if the witnesses had signed (standing or sitting) at the west end of the table, the testator might have seen part of their bodies, but could not see their hands. Not only is it not proved that they signed (standing or sitting) at that end of the table, but it appears, very early, that they signed sitting at the table, behind the partition, entirely out of view of the testator, where he could not possibly have seen them from the bed.

Mr. Roome, the scrivener, when he first testified, was asked what he did after the testator made his mark to the will. He answered that Mr. Merrick (the other witness) and himself wrote their names as witnesses to the will. The question was then put to him, "Then and there, in the presence of the testator?" and he answered, "No; we had nothing to write our names on, and we wrote them just

In *Wright v. Manifold*, 1 M. & S. 294, the testator could not, from his room, have seen into the room where the witnesses signed, without sticking his head out into the passage-way which connected the two rooms; although, as the witnesses were retiring from his room, he relied upon his attendant to assist him in rising.

In *Ellis's Case*, 2 Curteis 395, the witnesses were in an adjoining room, where they could neither see the testator nor be seen by him, though they were so near that they could hear him breathe.

In *Colman's Case*, 3 Curteis 118, folding doors between the two rooms were open, being tied back, but the table on which the witnesses wrote was so situated that the testator could not possibly have seen it.

In *Norton v. Bazett*, Dea. & Sw. 259 (5 Am. Law Reg. 52), the witnesses were clerks of the testator, and called by him from an outer office into his own, where he was sitting with his back towards the door. The will was written on two separate sheets, the *second* (see *And v. Seawell*, 3 Burr. 1773; *Gass v. Gass*, 3 Humph. 278; *Horsford's Case*, L. R. (3 P. & D.) 211) of which he signed, and they, his table being full of papers, took into their room for attestation. When they returned he was standing up, but otherwise relatively in the same position as before, and from which it was impossible for him to have seen them while signing.

In *Kiltick's Case*, 3 Sw. & Tr. 578, the deceased could, by changing her position in bed, have seen the witnesses sign her will in another room, but the proof was that she did not do so.

In *Violette v. Therriau*, 1 Pug. & Bus. (N. B.) 389, the testator had been paralyzed, and was, when his will was executed, unable to rise from his bed without assistance. A small table stood at the foot of his bed, and was concealed therefrom by the foot-board of the bed rising above it, so that, although he could see the persons of the witnesses,

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outside, in the kitchen, on the table, standing right by the door that enters into the bed-room, not more than eight or ten feet off; the door was open." To the question, "Could the testator see you sign your names from where he lay?" he replied, "I think not; it was around the door-post of the kitchen; this kitchen joins the bed-room." When he was subsequently (more than a month afterwards) recalled, he said that if he stood at the west end of the table where he signed, he would have been in open sight of the testator, but he added that he was not positive whether he stood there or not, and had no distinct recollection on the subject. He further said that, if he did stand at that end of the table, the testator, though he could have seen him, could not have seen him and Mr. Merrick write. He also said that Mr. Merrick, when he signed, sat at the front of the table, near the southwest corner, and that the testator

their arms and hands and the paper on which they wrote on the table, were invisible.

In *Robinson v. King*, 6 Ga. 539, the testator signed his will in bed, and was not able to get up without assistance. The witnesses wrote their names thereto on a piazza adjoining his room, and about ten feet from him. There was a door communicating with the room, but their relative positions were such that they could not see each other.

In *Brooks v. Duffell*, 23 Ga. 441, a will was executed by the testator in bed, towards evening, and, for the sake of seeing better, the witnesses stepped to a door, which, when opened, swung against the side of his bed, so that, without changing his position, it would have been impossible for him to see them, and he was too weak to notice anything that was going on.

In *Reed v. Roberts*, 26 Ga. 294, the testator, in extremis, was lying in a bed with four high posts, having a counterpane stretched across the head at the head to protect him from the air. After he had signed, the will was taken behind the head of the bed, to a chest against the wall, some seven or eight feet distant, and attested. The proof showed that he was too feeble to change his position without help.

In *Lamb v. Girtman*, 33 Ga. 289, the testator signed his will at a small table in a hallway, and then, being in feeble health, withdrew to his room adjoining, accompanied by a witness, who returned to the others, and then they all signed. The testator, when afterwards noticed by them, was lying in the ordinary attitude on his bed, and in that position could not have seen the witnesses when signing.

In *Graham v. Graham*, 10 Ired. 219, the witnesses went into another room to sign at a chest standing against the partition, two or three feet from the open door. The bed in which the testator lay stood also against the partition, with its head nearly opposite to the chest, so that

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ld not, he thinks, see him in that place. He also said t, when he drew the will, he sat in the place just men- ed, at the side of the table. While he cannot remem- whether he was standing or sitting when he signed, Mr. rrick testifies positively on the subject. He says that he aself signed sitting at the table, and that he thinks it ld not have been possible for any one on the bed on ich the testator lay, to see him. He also says that, after had signed, he rose from the chair and Mr. Roome sat vn in it, at the same place, and signed his name there. s clear, from the testimony, that if the witnesses had sat stood at the west end of the table, which was within a inches of the door, though, perhaps, part of their bodies ld be seen from the bed, their hands could not; they ld not be seen to write. Both witnesses testify, then, t when they signed they were in a room other than that

testator could, by turning his head, see the backs of the witnesses hey sat at the chest writing, but he could not see their faces, s or hands, nor the paper on which they were writing.

1 *Reynolds v. Reynolds*, 1 *Spears* 253, the testator, after being raised gn his will, sank back in his bed, and the witnesses went to a table hall and signed their names. The testator could not see them, as ay, and although he had strength to rise sufficiently to see them, he did not rise.

1 *Jones v. Tuck*, 3 *Jones* 202, the testator could not see the witnesses le signing his will in another room, without raising himself up on elbow, but this the witnesses thought him capable of doing, use they saw him turn himself several times in his bed.

1 *Orndorf v. Hummer*, 12 *B. Mon.* 619, the table on which the wit- ses wrote stood just behind the head of a lounge on which the tes- or lay, and four or five feet therefrom. He could not, from his ition, have seen the witnesses at all, and it seemed doubtful ther he could, without assistance, have changed his posture.

n *Neil v. Neil*. 1 *Leigh* 6, the testator, when two of the witnesses ed at a table by his bed, lay with his back to them, and his sight poor and the light in the room dim. He could not rise alone.

n *Boldry v. Parris*, 2 *Cush.* 433, the testatrix and one witness signed her room, and then that witness took the will into an adjoining om, where it was signed by the other two witnesses, out of the testa- x's sight altogether.

In *Edelen v. Hardy*, 7 *Harr. & Johns.* 61, the testator, after signing, quested the witnesses to retire, and they went into an adjoining om, separated from the other by a plank partition; there was no rect communication between the rooms, nor could testator have pos- ly seen them. See *Russell v. Falls*, 3 *Harr. & McHen.* 457.

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in which the testator lay, and that he could not see them when they signed. The object of the provision in the statute that the witnesses shall sign in the presence of the testator, is to prevent substitution and fraud. An attestation made in the same room in which the testator lay is, *prima facie*, an attestation in his presence. On the other hand, an attestation made in another room is, if not made in his presence. *Neil v. Neil*, 1 Leigh 60; *on Ev.* (12th ed.) § 272; *In the goods of Colman*, 3

In *Graham v. Graham*, 10 Ircl. 219, the witnesses were excluded out of the testator's room, and in such a case that, though he could see their bodies as they signed, he could not see the paper. It was held that it could not, in any proper sense, be said that the signing was done in his presence. See, also, *Jones v. Tuck*, 3 Jones (N. C.) 433; *Downie's Will*, 42 Ind. 42; *Hindmarsh v. Carlton*, 8 H. of L. Cas. 160; *Doe v. Roe*, 1 M. & S. 294, 296; *Tribe v. Tribe*, 1 Robt. 775;

In *Cornelius's Will*, 14 Ark. 675, attestation in the presence of the testator was held to be unnecessary. Also, *Abraham v. Wilkins*, 17

In a testator's "presence" means not only his corporeal presence but also that he must be mentally capable of executing a will. *v. Price*, Doug. 241; *Hudson v. Parker*, 1 Roberts. 24; *Watson v. Watson*, 451; *McGuire v. Kerr*, 2 Bradf. 244; *Jackson v. Moore*, 213; *Hall v. Hall*, 18 Ga. 40; *Aurand v. Wilt*, 9 Pa. St. 54.

Whether a witness's subsequent acknowledgment to an attestation made out of his presence, is sufficient, see *Stredge*, 11 Allen 49, reviewing all the prior cases; *Vaughan v. Vaughan*, 13 Am. Law Reg. 735; *Downie's Will*, 42 Wis. 66; *Duffie v. Duffie*, 40 Ga. 122; *Hindmarsh v. Charlton*, 8 H. of L. Cas. 160.

As to the effect or conclusiveness of an attesting clause, see *v. Davidson*, 12 C. E. Gr. 459; *Barnes v. Barnes*, 66 Me. 28; *Case*, 5 Mon. 199; *Carpenter v. Denoon*, 29 Ohio St. 379; *Hall v. Hall*, 531; *Croft v. Pawlet*, 2 Str. 1109; *Lloyd v. Roberts*, 12 158; *Crawford v. Curragh*, 15 Up. Can. 55; *Sainford's Case*, 630; *Ragland v. Huntington*, 1 Ircl. 561; *Pool v. Pool*, 18 Ga. 40; *Clark v. Donnorant*, 10 Leigh 22; *Lawrence*, 33 Miss. 622; *Deupree v. Deupree*, 45 Ga. 415; *Chapman v. Chapman*, 10 Paige 85; *Leaycraft v. Simmons*, 3 Bradf. 35; *Pennington v. Pennington*, 20 Minn. 245; and how far an attesting witness may qualify as a witness to the will. (*White v. Trustees &c.*, 6 Bing. 310; *Lucas v. Parsons*, 24 Ga. 415; *Will*, 23 Iowa 354; *Devey v. Devey*, 1 Metc. 349; *Barnes v. Barnes*, 286; *Rose v. Allen*, 1 Cold. 23; *Jenkins's Will*, 43 Wis. 6; *Sweeney*, 85 Ill. 50; *Otterson v. Hofford*, 7 Vr. 129).—REP.

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Bazett, Dea. & Sw. 259; Goods of Trimnell, 11 Jur. (N. S.) 248. Though the testator be blind, it must appear that he could have seen the witnesses had he had his eye-sight.
1 Wms. on Ex'rs 93; 1 Jarm. on Wills 75 note.

The decree of the orphans court will be affirmed.

CASES ADJUDGED
IN THE
COURT OF ERRORS AND APPEALS

OF THE STATE OF NEW JERSEY,
ON APPEAL FROM THE COURT OF CHANCERY,
JULY TERM, 1879.

THE MAYOR AND ALDERMEN OF JERSEY CITY, appellants,
v.
HENRY LEMBECK, respondent.

1. Chancery has no jurisdiction, in the absence of specific equities, over the assessment made in the course of municipal improvements.
 2. The act "to compel the determination of claims to real estate in certain cases, and to quiet the title to the same," does not warrant the filing of a bill to contest the legality of such assessment, on the ground of its being an encumbrance on land.
 3. The right to superintend the making of such assessments, is a common law right vested in the supreme court by the constitution, and such power cannot be transferred, by legislation, to the court of chancery.
 4. The true construction of this act indicated.
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On appeal from a decree of the chancellor, whose opinion is reported in *Lembeck v. Jersey City*, 3 Stew. 554.

The case made in the bill and answer was this: Certain ~~assessments had~~ been made for municipal improvements in

Jersey City v. Lembeck.

Jersey City, which, it was alleged, were an apparent the property of the respondent. By an act approved 26th of March, 1873, entitled "an act to adjust assessments in Jersey City," the supreme court was authorized to appoint commissioners with power to examine, revise, alter and adjust all unpaid assessments that had been made within a certain period; and that the commissioners so appointed acted on said assessments, and made reports, confirming some of them and modifying others. The bill alleged that such assessments were an encumbrance upon certain lands, the property of the respondent, as shown by the "final reports of the commissioners do not show that the property is not assessed in excess of the benefits received by said improvements for which said assessments were made." The prayer of the bill was, that the court might specify its claim or encumbrance upon said lands, and how and by what instrument the same was derived, and that it might be settled and adjudged whether the defendant had any estate, interest or right in, or encumbrance upon, said lands, &c.

Mr. Abbett, for appellant.

Messrs. Collins & Corbin, for respondent.

The lands in question are lots 42 and 44 Commercial Avenue, in block 523, in Jersey City. Prior to August 1876, Sebastian Goehner owned this property for many years. It was sold by the sheriff, and he afterwards executed a quit-claim deed for it. Henry Lembeck obtained title to this property by a deed from Patrick H. Ives, sheriff, to him, dated August 10th, 1876 (recorded in *li* p. 306), and by a quit-claim deed from Sebastian Goehner and wife to him, dated August 11th, 1876 (recorded *303*, p. 179). Sebastian Goehner "owned the property while the improvements in question were made, as before that."

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January 5th, 1872, the board of works of Jersey City confirmed, and the mayor approved, an assessment for the widening of Grand street and the Newark and New York plank-road from Ocean to Bergen avenue. This assessment on the lots in question was \$189.26. This assessment was reviewed by the commissioners appointed by the supreme court under the act of March 26th, 1873, entitled, "An act to adjust unpaid assessments in Jersey City." The new commissioners determined and adjudged that the reasonable and fair cost of this improvement was \$14,791.97, and confirmed the original assessment of January 5th, 1872. They thought the old assessment right, and so determined.

March 17th, 1871, an assessment was made for Nicholson pavement on West Grand street and Newark plank-road. This assessment on the lots in question was \$435.20. This assessment was reviewed by the new commissioners under act of March 26th, 1873. The new commissioners determined and adjudged that the reasonable and fair cost of this improvement was \$173,375.37, and confirmed the original assessment of March 17th, 1871. They thought the old assessment was right, and so determined.

August 17th, 1871, an assessment was made for a sewer in Bergen avenue, from Franklin street to Lexington avenue &c. This first assessment was \$4,421.80 more than the re-assessment, which was afterwards made by the new commissioners, under the act of 1873. The new commissioners put that amount on the city to be paid by taxation. The reduced new assessment on the lots in question was \$403.13. The board in this case complied with all the provisions of the act of 1873, specifically (*Case p. 10*). The only alleged defect is a neglect to state, affirmatively, in their report, that the property is not assessed in excess of the benefits received by the improvement for which the assessment was made, this defect being predicated upon the authority of the *Puassic Case*, 8 Vr. 538.

July 12th, 1872, an assessment was made for a main sewer in section A, in the second drainage district. The new

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commissioners only assessed \$238,217.01, and imposed upon the city \$128,270.69 to be raised by tax, which last amount had been assessed, by the old assessment, on private property. The re-assessment was, therefore, a reduction of \$128,270.69. The board in this case complied with all the provisions of the act of 1873, specifically (*Case pp. 6, 7*). The only alleged defect was that stated in the last paragraph, arising under *Passaic Case*, 8 Vr. 538.

Mr. Leon Abbett, for appellants.

I. The chancellor decided this case upon the authority of *Bogert v. City of Elizabeth*, 12 C. E. Gr. 568. The present case is, however, I submit, different from that. The *Bogert* case related to an assessment founded upon the charter of the city of Elizabeth. The provision of this charter was unconstitutional, because it assessed the whole amount of the cost and expenses on the land, instead of assessing only the amount benefited. The court held that all the proceedings were a nullity. The court says (*p. 572*): "The complainant was not bound to remove these proceedings by *certiorari*; they were absolutely void, from beginning to end, and he had a right so to treat them; they could not grow, by lapse of time, into a right. The city can gain nothing by retaining the shadow of a right under sale; if retained for half a century, it would be nothing but shadow still. It is, therefore, a gratuitous injury to the complainant."

II. The present case consists in a re-assessment made under an act "to adjust unpaid assessments in Jersey City" approved March 26th, 1873 (*P. L. 1873, p. 442*). Under the decision of this court in the case of *State, Morris v. Jersey City*, the supreme court held that re-assessments made under this act of March 26th, 1873, could be set aside on *certiorari* where the reports were like those on pages 8 and 9 of the present case. In this case the commissioners confirmed the old assessment. The supreme court, in the case of *State, H*

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liard v. *Jersey City* (not reported, but the opinion delivered, orally, by Justice Dixon), upheld assessments made by these commissioners where the reports were in the form of those found upon pages 6 and 10 of the case. In these cases, the commissioners, having considered the matter specifically, assessed back a part of the costs upon the city

III. I submit that the language of the act of March 26th, 1873, contains expressions which can be fairly intended to imply that the re-assessments authorized were to be restricted in amount, so as to be commensurate with the charge imposed upon the particular land, and that, therefore, under the case of *Passaic v. State*, 8 Vr. 538, this grant of power to the new commissioners, under the act of 1873, to re-assess, will be sustained; and that, under the case of *State, Halliard v. Jersey City*, the court will presume that these commissioners did not assess in excess of the benefits received by the said improvements for which said assessments were made. If this view is correct, two of the assessments which have been set aside by the chancellor would be good, to wit, the assessment for a main sewer in section A, second drainage district, and the assessment for a sewer in the Newark plank-road, being those mentioned in the reports on pages 6 and 10 of the case; and that, as to these two assessments, they were valid liens upon the property of Mr. Lembeck.

IV. In reference to the two assessments which, under the authority of *State, Morris v. Jersey City*, 11 Vr. 485, would be set aside, on *certiorari*, by the supreme court, I submit that the owner of the property should be compelled to proceed, by *certiorari*, to set aside these assessments; that the act "to compel the determination of claims to real estate in certain cases, and to quiet title to the same" (*Rev. p. 1189*), was not intended to apply to those cases where there could be a valid assessment and there had been merely a mistake of the commissioners; that that act, so far as assessments were concerned, was intended to reach a case like that of *Bogert v. City of*

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Elizabeth, where the whole proceeding was a nullity. If the court adopt any other construction, do they not deprive Jersey City of the power to have these assessments reviewed on *certiorari*? Can the city *certiorari* these assessments?

P. L. 1877, p. 174 ch. 116, whilst authorizing municipal bodies to set aside certain assessments and order new ones, expressly says, that the act shall not authorize any assessment to be set aside which was made under "An act to adjust unpaid assessments in Jersey City." Is it the intention of the act to quiet title, that the city should be deprived of a substantial right, to wit, the right of re-assessment? Sebastian Goehner (*Case p. 14*) testifies, "the lot would have sold for more than \$200 more on account of the improvement." This witness (for Mr. Lembeck), therefore shows there ought to be some assessment upon these lots. And under the case of *State, Youngster v. Paterson, 11 Vt. 244*, the court will rely upon the judgment of the commissioners as to what the proper amount of assessment is rather than upon the vague guesses of witnesses.

V. The act entitled "An act to compel the determination of claims to real estate in certain cases, and to quiet title to the same," was passed March 2d, 1870. (*P. L. 1870, p. 20*) Three years after, on the 26th of March, 1873, the legislature passed an "act to adjust unpaid assessments in Jersey City," and the fifth section of that act provides that, when any assessment has been adjusted or confirmed by said board, it shall be, and is thereby declared to be, a new assessment, "and shall be final and conclusive as so re-adjusted, re-assessed or confirmed by said board upon the parties."

This section, then, provides for pending cases in *certiorari* being reviewed by said board, directing that no further proceeding shall be had under them; and the third section of the same act provides, "and any person or persons neglecting or refusing to apply to said board for relief from assessments, within such time as said board shall limit, not 1

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than thirty days and not more than sixty days, shall be considered as waiving all objections thereto."

The admission (*Case p. 17*) shows that advertisements were made by the commissioners, and a day fixed for a hearing, and a hearing was had wherever parties appeared in the cases in question, and that the commissioners acted upon these four cases as set forth in their reports annexed to the answer. As the act to adjust these unpaid assessments was passed three years after the act to quiet title, will not a fair construction of the act of 1870 be that it is subject to the provisions of the act of 1873, which made the assessments of these supreme court commissioners "final and conclusive, as re-adjusted, re-assessed or confirmed by said board, upon all parties?" If the act of 1870 is thus limited not to include the cases provided for in the act of 1873, then the chancellor was wrong in holding that, under the act of 1870, he had power to deal with these assessments thus made "final and conclusive" under the act of 1873.

Messrs. Collins & Corbin, for respondent.

I. If the assessments set up by the appellant (defendant) were invalid, the power and duty of the chancellor to make the decree appealed from are unquestionable in this court. *Bogert v. City of Elizabeth*, 12 C. E. Gr. 568.

II. The assessments were invalid. They were of two classes: (a) In one class, the commissioners appointed under the act of 1873 (*P. L. 1873, p. 442*), simply confirmed assessments previously made by the municipality. (See the reports of said commissioners, pp. 8, 9, printed case.) This they had no power to do. They were obliged, under the act, to exercise an independent, original judgment. This is the plain language of the act, and the supreme court has so held. *State, Morris v. Jersey City*, 11 Vr. 485. The appellant cannot be helped by resorting to the original assessments, for, first, they were not proved in the case;

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second, they could not be found to be proved (see (pp. 18, 19); and, lastly, as to the one confirmed by report on page 8 of the printed case, while the law under which it was made (*P. L. 1871, p. 1143 et seq. § 41*) may be constitutional (though we doubt it), it is notorious that assessments made in Jersey City at that time (1872) had been so often condemned in *8 Vr. 538*, cited below; and, as to the other, confirmed by the report on page 9 of the printed case, the law under which it was made (*P. L. 1870, p. 12 § 84*) was clearly unconstitutional under the *Agents Act*. (b) In the other class, the said commissioners, acting *de novo* and by themselves made invalid assessments (see their report pp. 6 and 10 of the printed case). These assessments are void under the adjudged cases in this court, because they do not show affirmatively that the assessment made does not exceed the benefits. *Passaic v. State, Del. Lack. & W. R. R. Co., 8 Vr. 538*.

The original assessment (not proved) doubtless had the same defect, and, moreover, was made under an unconstitutional law. (*P. L. 1871, p. 1122 § 59, p. 1118 § 47.*)

The opinion of the court was delivered by

BEASLEY, C. J.

Upon looking into the pleadings in this case, it appears that the chancellor had before him the proceedings of certain commissioners, with respect to sundry municipal assessments, and that, after examining them, he annulled them by his decree, so far as relates to the land on which they were an apparent lien. The case is bare of all jurisdictional facts, except two, viz., that the assessments in question were not in litigation, and that they were ostensible encumbrances on lands owned by the complainant, and of which he was in possession. Neither fraud, nor oppression, nor other inequity, on the part of the defendant, was alleged nor was it pretended that the commissioners, whose conduct was overhauled, were acting in the absence of due statutory

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authority. The defect on which the decree to vacate this taxation was founded, was that the commissioners omitted to show in their report an incident essential to its validity; that is to say, they did not state that "the amounts assessed on the property owners for benefits were not beyond the amount of the benefits received." It appears, therefore, that what was done in the court of chancery was this: A supervision was exercised over special officers performing a purely legal function, and that this bill has discharged, in part, the office, and nothing but the office, of a writ of *certiorari* at common law. The question is, whether such a power exists?

There is but one title claimed in favor of such an authority, and that is the act to be found on page 1189 of the *Revision*, entitled "an act to compel the determination of claims to real estate in certain cases, and to quiet the title to the same." The general object of this statute is stated in the first clause of the first section, which is in these words: "That when any person is in peaceable possession of lands in this state, claiming to own the same, and his title thereto, or to any part thereof, is denied or disputed, or any person claims, or is claimed, to own the same, or any part thereof, or any interest therein, or to hold any lien or encumbrance thereon, and no suit shall be pending to enforce or test the validity of such title, claim or encumbrance, it shall be lawful for such person so in possession to bring and maintain a suit in chancery to settle the title of said lands, and to clear up all doubts and disputes concerning the same, &c."

From this recital, it appears that the language of this provision is as comprehensive as it well could be, and that if such act is to be regarded as a thing standing by itself, and is to be interpreted by the force of its terms alone, it will seemingly confer the power that has been exercised in this case. But statutes do not stand in such a state of disconnection; each one is but a part of the general polity, and is to be construed with reference to general principles and

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laws, and in subordination to constitutional restrictions. It is in this wise that the will of the law-maker, and the reason and spirit of the enactment are ascertained, and by the use of this method with regard to this statute, all persons will agree, unless I greatly err, that it cannot have the scope that its language, if read by the letter, would seem to indicate, for, enforced in such sense, its control would cover a vast field that it is quite out of the question to suppose such a result was within the legislative scheme. Giving these statutory expressions their full, inherent significance it is, perhaps, not too much to say that almost every conceivable interest in, and right to, land, and every lien and encumbrance upon it, held or claimed by a person out of possession, could be, at the option of the party in possession, placed under the cognizance of a court of equity. It will be sufficient to hint at the innumerable cases to which this power would extend, by specially referring to a few examples. Whenever the possessor of lands should be apprehensive that an ejectment was about to be brought against him, he could forestall such proceeding by exhibiting a bill in chancery, and, in the absence of all particular equity, have the legal title of his adversary examined by that court, and, if need be, annulled. So a tenant, in case his landlord should claim any reserved interest in the leased premises might take a similar course. And there seems nothing to forbid the idea that, under the prevalence of such a power every case provided for by summary proceedings before a justice of the peace, under the landlord and tenant act, would be within the grasp of the equitable cognizance of the court. Every judgment, every proceeding to lay out a public road, every mechanics lien, every exercise of the right of eminent domain, all these, and the vast mass of analogous procedures, could be brought under the control of the chancellor, and, if a fatal mistake or error should be manifested in any of them, such defective procedures could be avoided by his order. In a word, it seems undeniable that, by force of a statutory interpretation that will support this bill, we

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much of the authority of the common law courts, which is exercisable by means of writs of error, *certioraris* and actions of ejectment, would be participated in, to a large extent, by the court of chancery. I cannot think that it was the design of the legislature to confound, in this extraordinary degree, the well-defined boundaries of these several jurisdictions.

But, beyond this, I further am of opinion that, if such legislative design existed and has taken form and substance in this act, nevertheless, the endeavor to carry such purpose into effect must prove entirely abortive. In this state, the higher courts of common law, as well as the court of chancery, are constitutional tribunals, and that means, that their essential powers and attributes cannot be affected by legislation. The constitution has made each what it is, and such as it was made it must be and remain until destroyed or modified by the hand by which it was established. It is hardly necessary to say that, to impart to a court of conscience any of the ordinary common law powers, would be to effect a radical change in both tribunals, and that the same consequence would follow from the transfer to a court of law, of any matters of equitable cognizance. The various provisions of the constitution itself plainly negative the legislative right to interchange at pleasure the powers which in here, by virtue of their primary organizations, in the various courts. By the original constitution of this state, the supreme court and the court of chancery were continued in existence, and it was thereupon immediately declared, by statute, that they should respectively be invested with the powers theretofore possessed by them; and, by the constitution of 1844, it was ordained "that the several courts of law and equity, except as herein otherwise provided, shall continue, with the like powers and jurisdiction, as if this constitution had not been adopted." It is plain, and has always been considered plain, that these organic provisions define with exactness the judicial institutions to which they are applicable. By force of them, the court of chancery has ever been deemed exclusively clothed with all those high

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and ample prerogatives and authorities which, in imitation of its English type, it had exercised ever since its introduction into our jurisprudence, and, in the same way, the powers and franchises of the supreme court were, in an essential respects, thought to be modeled after the usage and measure of the king's bench; and the jurisdictions of these tribunals were as separate, as defined, and as respectively exclusive, as were the jurisdictions of those venerable institutions, to which, in structure and power, they are nearly allied, and which they so closely resemble.

That the jurisdictional boundaries of these courts were considered to be completely settled, appears by many judicial declarations and resolutions; and that the powers of the one could not be transferred to the other, is manifest from the constitution itself, and not only from its general tenor, but also from a particular indication, for, in the instrument, by paragraph 10, section VII, article IV, it is declared "that the legislature may vest in the circuit court or courts of common pleas, within the several counties of this state, chancery powers, so far as relates to the foreclosure of mortgages and the sale of mortgaged premises—a provision that is entirely nugatory and superfluous, in a theory that the functions of these judicial bodies were subject to legislative transference. I can see nothing in the frame of our legal system, in the history of our jurisprudence, in our practice, or in the opinions of our own jurists that does not wear the semblance of repudiating all claim of a legislative competency to confer a purely legal faculty on the court of chancery, or a purely equitable faculty on the court of common law. The fact is, that the inability of the legislature in this particular is so clear that it cannot be denied, without an admission of the solecism that the legislature can altogether abolish any one of these constitutional tribunals, because if one essential power of such a tribunal can be handed over to another, so may all its essential powers—a proposition so exorbitant that, it is presumed, no one will venture to maintain it. Neither will it be gain

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said that it is, and always has been, one of the prerogatives of the supreme court of this state to supervise the proceedings and to correct the errors of all inferior tribunals, and of persons and bodies exercising particular legal functions; the practice is so fixed and the adjudications so clear upon the point, that it would be a mere waste of time to do more than state it as an *admission*. And the principal mode in which this power is put forth, is by the effective and comprehensive writ of *certiorari*. In the case under review, the officers, whose acts have been set aside, were employed in a matter which was, from first to last, of a purely legal nature. From the time of the first introduction of magistracy into this state, all through colonial and provincial times, up to within a very recent period, such a procedure as this has been carried on under the superintendency of the supreme court of this state, and if a person, in the situation of this complainant, had, at any time in all these years, conceived himself to have been wronged in point of law, by the doings of such officers, he would have applied to that court, which, in its discretion, would have commanded such doings to be certified to it, so that what was right in law might be done. Such was the ancient and such has been the modern method of executing the law in such an affair, and there is, perhaps, no single attribute of the supreme court that is, and ever has been, more peculiarly its own than this great power of supervision and regulation, and, to a certainty, if it can be shorn of this prerogative, then none of its prerogatives are secure. From these considerations, I am led to the conviction that, if this act is to bear the interpretation which must be put upon it in order to uphold this suit, then it should, on constitutional grounds, be declared by this court to be utterly nugatory.

It will be observed that the bill in this case claims for itself no other footing besides this statute, and, in this respect, the idea of the pleader is, in my judgment, correct. For, whatever doubts may be entertained in some of the American states upon this subject, such doubts have not

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prevailed either in England or in this state. It is believed that no instance can be adduced in which an English chancellor has undertaken to control the proceedings of a municipal body on the mere ground that such proceedings were irregular or illegal. If the acts of such bodies were not *extra vires*, it has always been conceded that they did not, except from the presence of special equities, fall under equitable control. Lord Cottenham, in *Frewin v. Lewis & Myl. & Cr. 249*, thus defines, in a few words, the doctrine of the English law. He says, speaking of the principles on which public officers and bodies will be controlled in his court: "So long as these functionaries strictly confine themselves within the exercise of those duties which are confided to them by law, this court will not interfere * to see whether any regulation they make is good or bad but if they are departing from their power which the law is vesting in them, if they are assuming to themselves power over property which the law does not give them, this court no longer treats them as acting under the authority of their commission, but treats them, whether they be corporation or individuals, merely as persons dealing with property without legal authority. While the court avoids interfering with what they do while keeping within the limits of their jurisdiction, it takes care to confine them within those limits; if they go beyond the line of their authority, and infringe or violate the rights of others, they become, like all other individuals, amenable to the jurisdiction of this court by injunction." And Judge Dillon, in referring to this and other authorities, remarks: "But if, in these cases, the property owners or the taxable inhabitants can have full and adequate remedy at law, equity will not interfere, but leave them to their legal remedy." 2 *Dillon on Mun. Corp.* 836.

In this state, from time to time, a similar doctrine has been asserted and enforced. As illustrating, I shall refer to two cases, the first being that of *Morris Canal Co. v. Jersey City*, 1 *Beas.* 256, in which Chancellor Williamson th

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clearly explains his views: "In the first place, it is insisted," he says, "that this court has not jurisdiction over the ordinances of a municipal corporation, and should not interfere with their execution; that the supreme court is the proper tribunal to review and correct the errors of inferior authorities. The authorities fully sustain the general principle that the court of chancery is not the proper tribunal to appeal to, to correct irregularities or errors of inferior tribunals, and that in this case the court should not interfere with the ordinances of a municipal corporation." And, again, his words are: "As a general doctrine, this court does not claim the right to interfere for the purpose of preventing a corporation from enforcing its ordinances in regard to assessments. There would be no limit to litigation in this court, if this court were to claim jurisdiction over assessments in ordinary cases."

The second case above referred to is that of *Holmes v. Jersey City*, 1 *Beas.* 310, in which Chancellor Green, in delivering the opinion of the court, is equally clear and explicit in his declarations on this subject, and he says, alluding to the bill in that case: "I find in it no recognized ground for equitable relief. There is no averment of irreparable injury, and the case made by the bill shows that, in the nature of things, the injury cannot be irreparable. There is no charge of fraud, nothing, in short, but the fact that the city is not setting the curb-stones on the true line, by which the complainant will be put to expense, and his property, as he alleges, be of less value. And the point upon which the whole case turns, is a mere question of law. I do not see why, on the broad frame of this bill, every act of a municipal corporation by which the property of a citizen is affected, whether it be the opening, paving or grading of streets, the regulation of buildings, the removal of nuisances, or the assessment of taxes, may not be the subject of injunction and the legal right be drawn in question in a court of equity."

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And, in fact, upon the least consideration of the subject, it will be apparent that the rule thus forcibly enunciated by these experienced and eminent lawyers, is the only one that would be consistent with an equitable system, one of whose fundamental maxims is, that it will not take upon itself, except in certain well-known cases, to settle legal rights when the redress at law is sufficient for that purpose. And it has already been shown that such legal remedy, in a very complete form, exists with respect to this class of cases with which we are now dealing. The present complainant could have made his application for a writ of *certiorari*, unless such right had been forfeited by his own neglect, and which, as a mode of redress, would have been even more efficacious than this bill, because, in such a proceeding, the assessment itself would have been annulled, whereas, in the present course of law, nothing but the lien upon the land is discharged. In the presence, therefore, of a convenient and complete legal remedy, there can be no pretence for appeal to a court of conscience, upon general principles. In order to remove a cloud from the title of the complainant. As I have said, the statute in question is the sole foundation for this bill, and such statute is possessed of no efficiency for such a purpose.

But in leaving this branch of the subject, it is proper to say that this exclusion of equitable processes from matters of this nature, is not regarded by me as a defect in our legal system, and that every effort could be extended to remove this defect, and it would be most disastrous. Every one is entitled to say, that, under such a condition of our city, it is strange that, for any great length of time, we have so happily administered our affairs. Most of our assessments, relating to the laying out of streets and the making of streets and the improvement of the same, are by our laws referred to the courts, and it is that, in this vast machinery of cases, every such proceeding, affecting, as the present appears to do, the public interest in litigation. Every person who is interested in the bill, and

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could recover his costs from the public, and which costs, in many cases, would exceed the amount of the tax in dispute. Nor, by force of present laws, would it seem possible to restrain or repel this deluge of litigation, for if the right to file such a bill exists at all, such right is obviously an absolute one, in nowise resting in the discretion of the chancellor.

Chief Justice Caton, in his opinion in the case of *Chicago v. Frary*, 22 Ill. 34, has forcibly depicted the evils that would ensue from the interference of a court of equity with this class of cases. "Under such a system of the administration of the laws," such is his language, "with so complicated a revenue system as ours, rendered so by a tender regard for the rights and interests of the citizens, no government could exist for a single year. Let us now, by sustaining this bill, stretch out the strong arm of this court, and stay the hand of the collector in every case where any irregularity can be shown in the assessment of the revenue, and a flood of injunctions would spread over the land at once. State and county revenue would cease to be collected, at least till the termination of protracted litigation, and the wheels of government would stop." And, again, the chief justice says: "If we permit the injunction to be issued where the tax is authorized by law, and the thing taxed is liable to that tax, there is no stopping-point short of enjoining all taxes whenever any irregularity has intervened. This power the court of chancery has never assumed, nor could it, without the most disastrous consequences to the state."

Although I have come to the conclusion, from the foregoing considerations, that this statute cannot have the force ascribed to it, still, it seems to me, it is quite feasible to give it an effect that will not only be legal, but highly useful. The extent to which I would give it force may, in part, be best indicated by negations as to its operation in certain classes of cases. I would say it was not meant to be operative when the party in possession of lands has the

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means, by an ordinary proceeding at law, of testing adverse claim that he wishes to have settled, unless, in such a state of facts as was presented in the case of *Bogert v. City of Elizabeth*, 12 C. E. Gr. 568, in which the pretended law was an absolute nullity, in consequence of the law itself under which it had been taken being unconstitutional, that the proceeding, being *ultra vires*, it could be fairly said that the keeping on foot of such a mere pretence was, *per se*, unconscionable. And, even with respect to this case, it should be borne in mind that the assessment had fully run its course, and had exhausted itself in a sale of the land, and that such sale was, and for all time must have continued to be, a mere nullity, to which even legislation could not impart life. The decision adjudged that such a state of things was a case within the statute; it went no further. But my exposition will exclude the class of cases embracing the one now under review, because the purpose of the act was to relieve, not persons who had the power to test a hostile claim by a direct proceeding in the usual mode, but to aid those persons whose situation afforded them no such opportunity. The inequity that was designed to be remedied grew out of the situation of a person in the possession of land as owner, in which land another person claimed an interest which he would not enforce; and the hardship was that the person so in possession could not force his adversary to sue, and thus put the claim to the test. The title of the act indicates that this is its purpose, for it is an act "to compel the determination of claims to real estate." In the present instance, the complainant had it in his power by one of the customary processes of the law, to bring to judgment the claim he wished to control, and it would therefore, seem to be going out of the way to maintain that this statute is applicable in aid of his inaction. If a person in possession of land can throw the hostile claim into the course of law, and thus get rid of the cloud overhanging his estate, why should he not do it? and what reason is there to say that this act was designed to help a party

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was in no strait, but of his own choosing? On the other hand, there is a class of cases in its application to which the law under consideration would be highly reasonable and beneficial. I would instance, as a sample, the case of a doubtful claim upon land arising under a will, a person who asserts an absolute title being in possession. In this situation the existence of such a claim, no matter how inauthentic or unsubstantial, would work, oftentimes, a serious injury to such real owner, and, without statutory help, the latter might not, in all cases, be able to clear his title. In such a conjuncture the present act would operate favorably, and, in such connection, would be in harmony with legal and constitutional principles. In my view, that law was intended for the relief of such cases of hardship as this and other cases of a similar nature; but it was not intended to aid those who have no need of aid, and to this latter class the complainant belongs.

I think the decree should be reversed, and the bill ordered to be dismissed, with costs.

Decree unanimously reversed.

SYLVANUS C. LATHROP and wife, appellants,

v.

THE GROTON SAVINGS BANK, respondent.

A person being the equitable owner and in the occupation of land, the record title being in a third party, must refrain from all acts calculated to produce a false impression as to the state of the title, in order to hold a person dealing with such ostensible owner, to the duty of inquiring with respect to the interest of such occupier.

On appeal from a decree of the chancellor, whose opinion is reported in *Groton Sav. Bank v. Batty*, 3 Stew. 126.

Lathrop v. Groton Savings Bank.

Mr. S. B. Ransom, for appellants.

I. Before and at the time of the commencement of foreclosure proceedings by the Groton Savings Bank, title to the premises in question was in the appellant, *Sarah Ann Lathrop*, in fee-simple, free and clear of all encumbrances :

(1st) She had been in the quiet, peaceable, unchallenged possession of the premises for twenty-four years, all time claiming it as her own, using it as her own, paying rent, and no one disputing her title. For all this time possession and enjoyment of the property had been adverse.

(2d) She and her husband had built a dwelling-house upon it with their own money, at a cost of from \$3,000 to \$4,000, which house she and her family had occupied as a residence, and as owner in fee, for a period of twenty-four years.

(3d) They had put upon it a shop, worth \$500 or \$600, at their own expense.

(4th) So, if John and William Batty, or either of them ever had a right of entry on said land, it was barred by the statute of limitations.

“Every real, possessory, ancestral, mixed or other action for any lands, tenements or hereditaments, shall be brought or instituted within twenty years next after the right or title thereto, or cause of such action, shall accrue, and not after.” (*Rev. p. 597 § 17.*)

“The actual possession and improvement of land, as owners are accustomed to possess and improve their estates without any payment of rent or recognition of title to another, or disavowal of title in himself, will, in the absence of all other evidence, be sufficient to raise a presumption of his (the occupant’s) entry and holding as absolute owner.” *La Frombois v. Smith, 8 Cow. 589.*

Such was the character of Mrs. Lathrop’s possession.

II. The possession of the land by the Lathrops for twenty years, as owners, bars all suits by the Batties

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their grantees or mortgagees, for the recovery of the money the deed was given to secure, as well as all suits for the recovery of the land. Such lapse of time raises a presumption of payment.

III. The Groton Savings Bank, as mortgagee of Batty, stands in no better position than Batty himself. When the bank took its mortgages, it was chargeable with notice of the possession by the Lathrops, and of the title under which they held.

When the first mortgage was given (November 1st, 1863), the Lathrops had been in the undisputed possession, as owners, for eleven years, during which time they had expended about \$4,000 of their own money on the premises. When the second mortgage was given (October 1st, 1869), the possession of the Lathrops and their use of the property remained unchanged. They had then occupied it, as owners, for seventeen years. This possession was notice to the world of the title under which they held. On this point see 4 *Kent Com.* 179 and notes; *Tuttle v. Jackson*, 6 *Wend.* 213, 226; *Wright v. Douglass*, 10 *Barb.* 97; *Troup v. Hurlbut*, 10 *Barb.* 354; *Merritt v. Northern R. R. Co.*, 12 *Barb.* 605; *Frazer v. Weston*, 1 *Barb. Ch.* 220, 232; *Colby v. Kenniston*, 4 *N. H.* 262; *Norcross v. Widgery*, 2 *Mass.* 508; *Eyres v. Dolphin*, 3 *Ball & B.* 301; *McMahon v. Griffing*, 3 *Pick.* 149; *Malpas v. Ackland*, 3 *Russ.* 273; *Billington v. Welsh*, 5 *Binn.* 129; *Davis v. Blunt*, 6 *Mass.* 487; *Howard Ins. Co. v. Halsey*, 4 *Sandf.* 573; *Daniels v. Davison*, 16 *Ves.* 254, *S. C.* 17 *Ves.* 433; *Allen v. Anthony*, 1 *Mer.* 282; *Johns v. Norris*, 12 *C. E. Gr.* 485; *Pendleton v. Fay*, 2 *Paige* 202.

These cases establish the general principle that possession of land by a tenant is notice to all the world of the possessor's title and claim. Therefore, the possession of the Lathrops was notice to the Groton Savings Bank of Mrs. Lathrop's title and claim. This possession was sufficient to put the bank on inquiry into the nature of her claim; and its neglect to make such inquiry, evinces bad faith or gross

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negligence. But the learned chancellor, in his opinion, seeks to take this case out of this principle, on several grounds. He thinks there is reason to believe that, admitting the deed to the Batties was merely conditional, recourse was had to absolute deeds to Bishop and the Batties, instead of mortgages, with a view to securing the property from Lathrop's creditors, and with the design of thus concealing what they now insist was the true ownership of the property, and so misleading the public.

The learned chancellor cites several cases to show that this case does not come within the rule that possession is notice of the possessor's title. First, he cites the case of *Cook v. Travis*, 22 Barb. 338, 20 N. Y. 400. In this case the court recognized the general rule, that the possession of land is notice to others of the possessor's title, but held that it did not avail in that case, because that case came within the operation of another rule of universal application: that, where a party puts upon record a deed by which he conveys the absolute title to his grantee, he is thereby estopped from setting up any secret arrangement by which his grant is impaired; or, in other words, he is estopped from impeaching or contradicting his own deed, or denying that he granted the premises which his deed purports to convey. In this case the controversy was between two sheriff's titles, the junior one being recorded, the elder not. The purchaser under the junior execution, mortgaged the premises; the defendant in the executions continued in the possession. The court held that his possession must be considered as in subserviency to the recorded title, on the principle above stated.

The next case referred to by the chancellor is the case of *Williamson v. Brown*, 15 N. Y. 354. In this case Justice Selden, in delivering the opinion of the court, laid down the general rule as follows: "Where a purchaser has knowledge of any facts sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the

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y and ascertained the extent of such prior right, or to been guilty of a degree of negligence equally fatal to aim to be considered as a *bona fide* purchaser. He adds: "This presumption, however, is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right, *notwithstanding the exercise of proper diligence on his part.*"

The last clause of Justice Selden's remark is omitted in the chancellor's opinion. The exercise of due diligence is the controlling element in the question.

Sett v. Smith, 23 N. Y. 252, is the next case referred to the chancellor. All that was held in this case was, that the possession by a husband of the wife's real estate, is to be taken as her possession, so as not to put a person on inquiry as to the rights of a third person from whom the defendant, to cover his own fraud, took a deed unknown to the purchaser. I do not see that it has any application to the present case.

The chancellor then cites: *Van Keuren v. Central R. R. of N. J.*, 9 Vr. 165; *N. Y. Life Ins. Co. v. Cutler*, 3 Sandf. 46; *Newhall v. Pierce*, 5 Pick. 450; *Scott v. Gallagher*, 10 Cr. 333; *McCulloh v. Cowher*, 5 Watts & S. 427. These cases all recognize the general rule that the possessor of land is notice of every title under which the occupier claims. But they all hold that a subsequent purchaser in good faith is not chargeable with notice where the possessor has not put on record a title inconsistent with his possession. This principle was very forcibly stated by Judge Woodruff in his charge to the jury, in the case of *McCulloh v. Cowher*, 5 Watts & S. 427, cited by the chancellor. It was very forcibly stated by Mr. Justice Van Syckel, in the case of *Van Keuren v. Central R. R. of N. J.*, 9 Vr. 165.

This case is not within the principle invoked by the chancellor. Lathrop and his wife have not, nor have either of them ever, executed any deed or conveyance of any kind to put them from availing themselves of the well-settled rule that their possession is notice to the world of their

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title. The title originally was in the Coles estate. It remained there until February 19th, 1856. From 1853 to 1856, Lathrop and his wife built a house on the lot, and occupied it as owners; spent \$3,000 upon it, the record title being all the time in the Coles estate. Suppose Cole's heirs, instead of giving a deed to Bishop, had executed a mortgage to the Groton Savings Bank, could it be pretended that the bank would not have been bound to inquire by what right the Lathrops held and claimed to be owners? And, while Bishop held the legal title, from February 19th, 1856 to August 19th, 1858, was there anything on the record to excuse a purchaser from Bishop from inquiry as to what title Lathrop claimed? And after the transfer to the Batties, were the records in any way changed? Was there anything on the records, from that time to this, to excuse such inquiry?

The fact that the legal title never was in the Lathrops, makes the rule that possession is notice of the possessor's title, apply with all the more force.

V. The Groton Savings Bank does not occupy the position of a subsequent purchaser for value. The equitable interest of Mrs. Lathrop in the premises is not disputed. In the bill filed against the Batties by Mrs. Lathrop, to compel them to convey the premises to her, they did not answer, but suffered a decree to go against them. It is incumbent, therefore, upon the Groton Savings Bank, before they can have any standing in court, to show that they stand in the position of subsequent purchasers for valuable consideration. The burthen of proof is on them. They have not attempted to prove it. There is not a particle of proof to show that they ever paid one cent for the mortgage.

VI. The Lathrops were not bound to go to Connecticut and serve a notice on the Groton Savings Bank, of the title to the property, when they heard that the mortgage had been given to the bank. It was the duty of the bank

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to inquire of their title before taking the mortgage. *Philhauer v. Todd*, 3 Stock. 312, 316; *Story's Eq. Jur.* § 385.

Messrs. Collins & Corbin, for respondent.

I It is only possession of which a purchaser or mortgagee *has knowledge*, that is constructive notice to him of the possessor's rights in lands. A too meagre statement of the facts, in some of the reported cases—the purchaser's knowledge of the fact of possession being really *assumed*—has led, we think, to an erroneous opinion that possession is notice *per se*. The earliest case on the subject is *Taylor v. Stibbert*, 2 Ves. Jr. 437. In this case, Lord Rosslyn says, page 440: "Whoever purchases an estate from the owner, *knowing it to be in the possession* of tenants, is bound to inquire into the estate these tenants have."

The next case is *Daniels v. Davison*, 16 Ves. 249, a judgment of Lord Eldon's. This seems to be the leading case. All the modern cases go back to and rest upon it. It is generally cited far too broadly, an error for which the head-note of Mr. Vesey is perhaps responsible. The case is founded directly on *Taylor v. Stibbert*, and Lord Eldon says expressly, page 253: "Cole's answer is, that *he knew the plaintiff was in possession*, but did not know the nature of his possession, not taking the trouble to inquire whether he was tenant or purchaser."

In *Rogers v. Jones*, 8 N. H. 264, the court notices the inexactness of statement in the reported cases, and says: "Expressions in some of the authorities" (citing them) "would seem to indicate that there should be knowledge of possession, but others" (citing them) "contain no such qualification." That cases of the latter class do not contain such qualification, is due either to meagreness of statement of the facts, or, in the later cases, to a misapprehension of the principle involved—that is, a taking it for granted, by both court and counsel, that the rule is broader than it really is or ought to be. The point is not *discussed* in any of these cases. Indeed, we find no case where it is dis-

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tinctly held that knowledge of the possession need *not* exist, unless it be *Birch v. Holloway's Devisee*, 2 J. J. Marsh. 12—80 (where the meaning of the court is not at all clear, and no authority is cited), and *Wickes v. Lake*, 25 Wis. 71, where there is a very able *dissenting* opinion by Chief Justice Dixon, to which we call particular attention, especially to pages 97 and 98.

In *Grimstone v. Carter*, 3 Paige 421, Chancellor Walworth says, page 437: "If the person claiming the prior equity is in the actual possession of the estate, and the purchaser has notice of that fact, it is sufficient to put him on inquiry as to the actual rights of such possessor, and is good constructive notice of those rights."

In *Billington v. Welsh*, 5 Binn. 129, Chief Justice Tilghman, while inclined to hold that notorious possession may imply knowledge of it, yet, in a case where there was undoubted possession in fact, but, by reason of the peculiar situation of the land with regard to adjoining property, it was not readily discernible, held that that was not constructive notice; and Justice Yates, in his opinion, takes substantially the ground now urged upon this court.

In *Davis v. Blunt*, 6 Mass. 487, the court justifies its decision because of knowledge of the possession.

We call attention to *Sugden on Vendors* (7th Am. ed.) 55—63 (*105:2) note, and to *Le Nere v. Le Nere*, 2 White & Tudor's Lead. Cas. in Eq. 35, end of Am. note, where this subject is discussed in some of its phases.

We are aware that it may be urged with force that, granting our premise, still, actual residence in a dwelling house for many years ought to be taken as presumption of knowledge of possession, and some cases seem to bear out that position; but it must be remembered that the respondent is a corporation of another state, having its office a hundred miles away, and that it dealt with the legal record owners at their place of residence there. In *Le Nere v. Le Nere* (p. 197), a distinction is drawn between the case of neighbors and visitors of a possessor and that of persons living

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at a distance, in the matter of presumption of knowledge of the possession.

Of course, if there be no presumption of knowledge by the respondent of the appellants' possession, it was incumbent on the appellants to prove the fact of such knowledge, and this they have not attempted to do.

On the facts of this case, however, we think the point above made, whether sound or not, is not at all involved. Of course, the possession of the appellants gave them no rights. It was, at most, merely notice of whatever rights they had. If they had no interest in the property, or if they had an interest which is not entitled to the aid of a court of equity, their possession will not help them. We will, therefore, now discuss the case on the facts, conceding, for the argument, that their possession was constructive notice of their rights.

II. (1st) If Mr. Lathrop's story is true, that William and John Batty took a deed of the house lot in 1858, as security, then, in 1863, when the respondent took its \$1,000 mortgage from the Batties, it acquired a lien on the interest which the Batties then had in the house, which was \$1,100, with interest from August 19th, 1858, and at this date would amount to about \$2,700. To this, add money paid on the property by Batty for taxes, water rents and redemption of sales, and we have a total of over \$3,500. This, with assessments for street improvements, and interest in arrears when the Batties bought, in 1858, would probably cover the two mortgages of the respondent. Lathrop does not claim that he ever paid rent, or made any payments at all, to John or William Batty, and if his testimony stopped here it would matter little whether it is true or false.

(2d) But Lathrop says, and reiterates, that he and his wife, and not Batty, paid all the taxes; he swears that he never paid any water rents, because he had not the means.

(3d) The appellants' answer claims, further, that, in 1861, Mrs. Lathrop made an agreement with her brothers, John and William Batty, to advance Mr. Lathrop means to build

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two houses on the shop lot; and that he should contribute the labor and receive all the profits; and that these prospective profits should be applied to pay the debt of Mr. Lathrop on the house lot; that the two houses were built and sold at a large profit, but the Batties had failed on account. These houses on the shop lot were sold, one in 1865 and one in 1867. The respondent's first mortgage was made in 1863, and recorded in 1864. A verbal agreement by the owner of the shop lot that he would apply the profits to be derived from the sale of that property to the payment of the cost of the house lot, would have been of questionable validity against a mortgagee coming in with a lien on the house lot before the shop lot was sold. But it is evident that no such agreement was ever made. The transaction of erecting two houses on the shop lot was entirely distinct from the transfer of the house lot.

(4th) What, then, was the arrangement under which Lathrop worked on the two houses built on the shop lot? Mr. Batty says that Lathrop was to have one-third of the profits made on the houses; that Lathrop was well paid for his work, and that no money was made on the houses. He states the agreement relative to the two houses on the shop lot as independent of the transaction about the house lot. In this, Batty is confirmed by the testimony of his sister Mrs. Lathrop, one of the appellants.

(5th) Lathrop was fully paid for his labor on the two houses. It is very evident that if the agreement was as Lathrop says, that he should contribute the labor and Batty the materials, it was not carried out, and that, as Batty says, he paid Lathrop more than he could have hired others for.

(6th) We have so far discussed the case on the theory that there was a trust in the purchase of the house, and that John and William Batty took it, in 1858, merely for security. But we do not by any means admit this claim. William Batty swears that the arrangement was a sale for \$3,000, paid, with an agreement to convey the property to Lathrop for its cost to Batty. Mrs. Lathrop seems to have

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no knowledge of any arrangement with her brothers about the house lot. She certainly does not support her husband's story. The deed states the consideration as \$3,000. It is probable that the whole was paid before the deed to the Batties, and that the title was left standing in the name of Bishop for fear of creditors. Lathrop is not to be believed. Batty's testimony, given in Florida, without memoranda, agrees with the public records and undisputed facts, and is entitled to credit.

(7th) Mr. and Mrs. Lathrop knew of the giving of the first mortgage at or soon after the time it was given. Had they then set up their claim or notified the respondent of it, the respondent could have protected itself, for the Batties were responsible then. The appellants should not have permitted the Batties to use their record title to defraud innocent lenders. When they acquiesced in the first loan, they thereby justified the respondent in relying on Batty's title for a second mortgage.

(8th) Whatever property Mrs. Lathrop ever had, she derived from her husband. As early as 1855 there were judgments against him which are still unsatisfied. The conveyance of Lathrop's property, either to his wife or to the Batties, was a fraud on Lathrop's creditors. The property was left in the name of Bishop nearly three years, although Lathrop says he paid Bishop's loan in a little more than one year from the making of the deed to Bishop.

He who comes into equity, must come with clean hands. They are not entitled to the interference of the court in their behalf against the legal record title of the respondent.

The opinion of the court was delivered by

BRASLEY, C. J.

This bill was exhibited to foreclose two mortgages, one of which was given by William and John Batty, and the other by the same John Batty alone. In both of them the complainant was the mortgagee. The defence set up is,

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that although the absolute title to the mortgaged premises was and is vested in these mortgagors, or in one of them, and although such is the title as it appears upon the record in the clerk's office, yet, nevertheless, the real owner, in equity, was the defendant, Mrs. Lathrop, and that as she was openly in the possession and enjoyment of the property both when these encumbrances were executed and for a long time antecedently, that the complainant, from that fact, was put upon inquiry, and that if it had discharged that duty, it would have discovered that its mortgagors were mere trustees, having no right to execute these instruments or either of them.

This is not a case in which it is necessary to look closely into the doctrine that the visible occupation of land will under certain conditions, put a person acquiring an interest in such lands from a third person, invested with the apparent title, on inquiry with respect to the rights and equities of the person so in possession. This doctrine, as affected and perhaps, limited, by our registry laws, would, in a proper connection, present an interesting subject for examination but in its relation to the present case, such examination would be out of place, because the conduct of Mrs. Lathrop the defendant, has been such, with regard to the complainant, as to remove this case quite out of the operation of such doctrine. The chancellor was of opinion, and I altogether concur in that opinion, that the silence of Mrs. Lathrop and her husband, when they were informed that the first mortgage had been given, and their failure to object to the same or to notify the complainant of the situation of the equitable title, was conduct such as would naturally lead to the conclusion that the mortgagors were the absolute owners of the property, and that consequently Mrs. Lathrop is not in position to complain that they were dealt with on that footing. To acquiesce for such a length of time in the first mortgage, was to accredit the Batties with the right mortgage, and, in view of such acquiescence, the complainant was relieved from the duty of making inquiry. It is

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be reasonably questioned whether, in many cases, the rule that the possession of lands being in a stranger to the documentary and record title makes it unsafe to trust to such title with implicitness, has not been pushed to an extreme so as to produce inequitable results; and it certainly seems necessary, if the rule is to retain a leaven of justice, to annex to it the qualification that the occupier of the property should be required to refrain from doing anything having an illusive tendency with respect to ownership.

On this ground, I shall vote to affirm this decree.

Decree unanimously affirmed.

JOHN W. STITT, appellant,

v.

HENRY HILTON and others, respondents.

Where an answer explicitly and fully denies the grounds on which an injunction has been granted, it must be dissolved, although exceptions to other parts of the answer have been filed.

On appeal from a decree of the vice-chancellor, whose opinion is reported in *Stitt v. Hilton*, 3 *Stew.* 579.

Messrs. Cortlandt & R. Wayne Parker, for appellants.

I. The defendants are not entitled to a dissolution of the injunction unless they answer the bill fully, and all allegations and charges in it, and all interrogatories founded on and incidental to them. The rule is strictly adhered to in cases of fraud. Insufficiency of the answer is reason enough. *Vreeland v. N. J. Stone Co.*, 10 *C. E. Gr.* 143.

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Gibby v. Hall, 12 C. E. Gr. 282; *Shotwell v. Stru* E. Gr. 31. In this case the sole failure was in not ing as to value of the property conveyed.

MacMahon v. O'Donnell, 5 C. E. Gr. 306. In t single denial was made of compound allegations.

Morrell v. Randall, 2 C. E. Gr. 345, being a de insolvency, with an "unless" the advances to M. & made him so. Also, *Teasey v. Baker*, 4 C. E. Gr. 6. a denial of making false and fraudulent representati

The conclusion is inevitable that the conveyance made, as he insists, as an absolute conveyance to h was intended for his security, merely, and he so und it. *The relation of debtor and creditor, in respect to th which formed the alleged consideration of the conveyan existed. This, of itself, determines the character of the ance.*

Sweet v. Parker, 7 C. E. Gr. 457. Note that, in th interest is charged, and payments made by sales, and cre

Phillips v. Hulsizer, 5 C. E. Gr. 308. Continuous debt a test. The debt continues, in spite of the deed out any note or bond. It is not extinguished or me a wife taken as security. *DeCamp v. Crane*, 4 C. E. (

But the first answer to be made to this paper is, tl vitiated by the unlawful book-keeping and charges on it is founded. It was obtained from a sick man, reading; without giving a copy; in the form, not agreement, but of a statement, apology and request t original proposition be carried out; that they shou as security. If it means any more, it is voidable for and oppression, and, in any event, subject to the acc be taken.

The result of this is, that the defendants are true possession, refusing and denying their trust, and wi ing an account, both of the earlier matters, in res which fraud is charged, and also of their dealings si deeds. They refuse to account for the rents and pr

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the lands or of the mills. They are unfit to act as trustees, and cannot be trusted by this court.

It is very likely that, on a new accounting, the whole of the alleged debt will be wiped out.

The discounts and guarantee together amount to over \$500,000. Whatever is false or allowed on sales to themselves is recoverable, with interest.

There is \$120,000 of stock which Stewart & Co. worked up and disposed of. There are the real values of the goods sacrificed by them at auction, or bought in by themselves. There are, again, the rents and profits which they made in our mills, by manufacture carried on for twenty months, till July, 1877, in Franklin, and till after the suit in New York state.

We ask an order that the injunction be maintained, and that the complainant is entitled to proper discovery, account and relief.

Messrs. McCarter & Keen, for respondents.

I. The facts set up in complainant's bill, petition and affidavits are not sufficient, in law, to entitle complainant to the injunction allowed in this case.

II. The facts disclosed by the answer, in portions thereof directly responsive to the bill, show that the bill was disingenuous, and concealed from the court important facts, which, if disclosed, would have prevented the allowance of an injunction. In such a case the injunction will be dissolved, without going into the merits. *Endicott v. Mathis*, 1 Stock. 110; *Holmes v. Jersey City*, 1 Beas. 299; *Kerr on Inj.* 628.

III. The allegations of the bill tending to show that the complainant was coerced into executing the papers under which the defendants obtained the deeds, do not show such duress or fraud as will avoid the deeds. *Dolman v. Cook*, 1 McCart. 56, 60.

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IV. The deeds executed by complainant are ab their face, and, unexplained, clearly entitle defendant possession of the land conveyed by them. If th be treated as given in fulfillment of the contract of 25th, 1875, and subject to the trusts therein express by the terms of that contract, defendants were er the possession of the land.

V. The most favorable view that can be taken plainant's case, on his own showing, is, that th although absolute on their face, are in equity b gages to secure the true amount due from Stitt Stewart & Co. In that point of view it is clear mortgagees are entitled to the possession of the la the debt is paid. *Price v. Armstrong*, 1 *McCart*. 41 *Eq. Jur.* § 1017; 4 *Kent* *155; *Rev. Mortgages*, p. 7

VI. The responsive allegations of the answer c overcome all the equity of the bill.

VII. The appellant, as mortgagor, has no right the mortgagee except to redeem the mortgage. not ask for a sale of the mortgaged premises, or tion of them, to pay the debt.

VIII. The letter of complainant to defendants of ber 14th, in connection with the payments made un defendants, operates in equity to extinguish any e redemption which the complainant might previous had in the land.

The opinion of the court was delivered by

DALBIMPLE, J.

The material facts of this case will be found opinion of the court below. It is not necessary t them here. The decree below, dissolving the injur affirmed, upon the single ground that the avermen complainant's bill, on which he bases his right to a

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tion, are fully denied by the answer, which is made under oath.

It appears that exceptions have been filed to the answer, and it was much criticised in the argument before this court. The exceptions, however, do not affect the matters on which it is alleged that the complainant's claim to an injunction is founded. As to them, the answer is full, and denies the equities set up. The filing of exceptions to an answer is, of itself, no objection to the dissolution of an injunction. The court will consider the exceptions only for the purpose of ascertaining whether they relate to those parts of the bill on which the injunction was awarded. The general rule is, that if the answer fully denies the equities which moved the court to grant the injunction, it will be dissolved, though there are other parts of the bill which remain unanswered. Exceptions to the answer cannot, therefore, avail the complainant on motion to dissolve an injunction on bill and answer, unless such exceptions point out a failure to answer the ground of equity on which the injunction was allowed. *Wyckoff v. Cochran*, 3 Gr. Ch. 421; *Robert v. Hodge*, 1 C. E. Gr. 299; *McGee v. Smith*, Id. 462; *Mitchell v. Mitchell*, 5 C. E. Gr. 234.

The rule that an injunction will be dissolved if the equity of the bill is fully denied by the answer, has its exceptions. This case has not, however, been brought within any of them. *Vide* cases cited in the opinion of the vice-chancellor, and *Firmstone v. De Camp*, 2 C. E. Gr. 309.

We have not now the facts fully enough before us to warrant opinion or discussion as to the conduct of either of the parties in reference to the matters in controversy between them. What may be their respective rights, upon an equitable statement of the somewhat complicated dealings which are now the subject matter of this litigation, can only be ascertained when the pleadings and proofs are perfected. All that is now decided or necessary to say is, that this case, as now presented, comes within the general

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rule of chancery as above stated, and the result is that already indicated, with an award of costs to respondents on this appeal.

Decree unanimously affirmed.

MICHAEL YOUNGS, appellant,

v.

THE TRUSTEES FOR THE SUPPORT OF PUBLIC SCHOOLS OF
THE STATE OF NEW JERSEY, respondents

1. A covenant by a grantee of mortgaged premises to assume and pay the mortgage debt contained in his deed of conveyance, is a contract with his grantor, only for the indemnity of the latter, and may be released and discharged by him.

2. After a release by the grantor of the covenant to assume and pay the mortgage debt, if before bill filed, the mortgagee cannot have the benefit of the grantee's contract of assumption, to found on it a decree against the latter for a deficiency, unless, before the release was executed, the mortgagee had acquired an equitable right in the contract, or the release be impeached as being made in fraud of creditors.

3. A voluntary release, by the grantor, of the covenant to assume and pay &c., made without consideration, in anticipation of bill filed, and for the express purpose of releasing the grantee from liability for deficiency, will not, for that reason, be invalid: *secus*, if the grantor be insolvent, and the effect of the release is to hinder or defraud creditors by depriving them of the means which the debtor had in his power to make available for the payment of debts.

4. A party who has assumed responsibility for a mortgage debt, either as mortgagor or by a subsequent assumption of liability, and has conveyed the mortgaged premises, taking from his grantee a covenant to pay the mortgage debt, has no more right to divest himself, by a voluntary release of the covenant of indemnity against his liability for the mortgage debt, than he would have to surrender, without consideration, a covenant against encumbrances, or a promissory note, or to give up property or rights of any other description which might be made available in satisfaction of debts. But this disability to release arises only on the happening of insolvency, and when creditors are

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thereby hindered or deprived of the means of collecting their demands.

5. On a bill filed for the foreclosure of a mortgage, praying a decree against a grantee of the mortgaged premises for deficiency, if the covenant to assume has been released, and the mortgagee seeks to avoid the release for fraud, the bill should be framed in that aspect, and make an issue on the fraud.

6. Where there are successive grantees of the mortgaged premises, each assuming payment of the mortgage debt, the decree for deficiency should determine and adjudge the order of the liability of the several grantees, especially where matters occurring between the parties may require a marshalling of securities.

On appeal from a decree of the chancellor, whose opinion is reported in *Trustees for the Support of Public Schools v. Anderson*, 3 Stew. 366.

Mr. C. M. Woodruff and *Mr. L. Cochran*, for appellant.

I. There are no facts or circumstances in this case to take it out of the principles enunciated by this court, in the case of *Crowell v. Hospital of St. Barnabas*, 12 C. E. Gr. 650. The important principle decided in that case will appear by the two following quotations from the opinion of the court:

"The mortgagee, being the representative of, and standing in the place of, the mortgagor, to enforce the rights of the latter against the purchaser, and having no greater or other equity in himself, is entitled to such remedy only as the mortgagor himself had against the purchaser when the bill was filed. In other words, being a stranger to the contract of the purchaser with the mortgagor, and to the consideration whereon it was founded, it will be competent for those who are parties to it to rescind and extinguish it at their pleasure, and, after such rescission and extinguishment, the contract becomes utterly incapable of enforcement."

"The obstacle in the way of a recovery by the mortgagee
* * * is fundamental, where the agreement is cancelled and discharged by the parties to it. He has no contract

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with the grantee of the mortgagor; his equity is only to stand in the place of the mortgagor, to be substituted in his place to a remedy which the mortgagor might have if he paid the mortgage debt."

II. The evidence in this case shows that the appellant improved the mortgaged premises and increased their value whilst he owned them, and that he had no dealings with the mortgagees, except to pay them interest, during the time he was the owner of the premises. There is no evidence of promises made by him to the mortgagees or their agents, by which their action was in any respect influenced, or that they were induced, by any act done or statement made by him, to postpone the collection of their mortgage, or to do or omit to do any act in relation to their mortgage. It can not, therefore, be pretended that the appellees have any independent equity to have their mortgage paid by the appellant.

III. It cannot be denied that parties to such a contract may, by voluntary release, such as that in this case, rescind and extinguish it, if the release is not intended to defraud, or does not defraud, any person whose legal status is such as to entitle him to question it. Was the legal status of the appellees such as to entitle them to question either the consideration or good faith of this release? No independent equity to have their mortgage paid by the appellant having arisen in their favor, the contract being such an one as this court, in the *Crowell Case*, declared the parties may rescind or extinguish at pleasure, the appellees cannot question the consideration of such release, and it could not have been *mala fides* as to them.

IV. If the last point is not well taken, it is clear that the good faith of such a release can only be questioned by the mortgagees (there being no independent equity) to the extent of inquiring whether the contract was actually extinguished, and intended so to be, by the parties—whether the release was a real or a sham one. If it was actually irrevocable

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cably made and intended, by the parties to it, to operate as a release and discharge of the covenant; if the contract was in truth extinguished as between the parties to it; if there was no separate agreement or understanding in regard to the release, to change or modify in any manner its terms, the contract is then actually extinguished, and is "utterly incapable of enforcement." The mortgagee can not, when the contract is thus extinguished, be entitled to decree for deficiency, based upon such contract, because "his equity is only to stand in the place of the mortgagor, to be substituted in his place to a remedy which the mortgagor might have if he paid the mortgage debt," and it is not pretended that the contract in this case was not, in good faith, released and extinguished by the parties to it.

V. The chancellor, in his opinion, says: "That the releases were executed and delivered merely in view of this suit, and for the purpose of preventing the complainants from having recourse, in equity, to Youngs, is proved, and, indeed, admitted." And, again: "It is conceded that it would have been too late to discharge or affect the equity under consideration as against the mortgagees *in invitum*, by agreement between the mortgagor and his grantee after suit had been actually commenced; and this case is within that principle." It is respectfully submitted, that the case does not support either of these views of the chancellor. It is not, and was not, admitted, that the releases were procured in view of *this* suit, and this case is not within the principle that it would have been too late to discharge or affect the equity under consideration as against the mortgagees *in invitum*, by agreement between the mortgagor and his grantee after suit had been actually commenced.

VI. The rule by which grantees are held for deficiency, particularly intermediate grantees, is a harsh one, and, in many cases, works great injustice. A grantee who has conveyed the premises, having assumed the mortgage in the deed to him, and having taken from his grantee a

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covenant of assumption, has no control over the mortgagee and can not, in any manner, influence his action in relation to the mortgage or the mortgaged premises. The mortgagee may, if he chooses, permit waste and destruction of the mortgaged premises; he may neglect or refuse to enforce the collection of his mortgage, and the grantee, who has assumed the payment of the mortgage debt, and in good faith conveyed the premises to another, has no means of protecting himself. In the opinion of the vice-chancellor, in the *Crowell Case*, 12 C. E. Gr. 152, he says: "The complainant became the owner of the mortgage (in that case the complainant was an assignee) before the covenant of the hospital was made; he did not purchase, relying upon it as a part of the security, nor does it appear that his conduct has since been, in the slightest degree, influenced by it." So, in this case, the appellees loaned their money before the covenant of the appellant was made, and, in loaning it, did not, of course, rely upon his covenant as a part of their security, nor does it appear that their conduct has been in the slightest degree influenced by it. Under these circumstances, a court of equity is called upon to declare whether, in case there shall be a deficiency, the appellant, who, unquestionably, procured from his grantor, before the bill was filed, a release of his covenant, which is valid as between the parties, and who is in nowise to blame for such deficiency as there may be, shall be made to pay it to the appellees, or whether they shall lose it; and it is respectfully submitted that equity demands that such loss as there may be shall fall upon the appellees, and not upon the appellant, and that the decree of the chancellor for deficiency against the appellant shall be reversed.

Mr. John P. Stockton, attorney-general, for respondents.

It is proposed to discuss the question raised in this case under the following heads, viz.:

I. Where one purchases land and assumes in his deed to pay off a bond and mortgage of his grantor, to which

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such land is subject, he thereby becomes a surety in respect to the mortgage debt. This obligation of the purchaser to pay the debt inures, in equity, to the benefit of the mortgagee, and he may enforce it against the purchaser to the extent of the deficiency, on a bill to foreclose.

II. A release from such assumption, executed by the grantor without a valuable consideration, after notice from the mortgagee that he looked to the grantee for the deficiency, admitted to have been executed for the express purpose of depriving the mortgagee of such collateral security, is fraudulent and void.

The whole evidence shows a combination between John Anderson, who borrowed the money, and the subsequent grantees, to defraud the trustees of the school fund out of the deficiency, if any there should be, and that the release was executed for this express purpose, under the advice of counsel that, under a recent case, such a result could be accomplished. It is respectfully submitted that this is but an attempt to use the court of chancery as an instrument to perpetrate a fraud upon the school fund.

The only point raised in this case is, whether the releases signed and executed by John Anderson to Benjamin Anderson, Jr., and Benjamin Anderson, Jr. to Hiram Ackerson, and Hiram Ackerson to Michael Youngs, had the effect to relieve Benjamin Anderson, Jr., Hiram Ackerson and Michael Youngs from the liability which they assumed by accepting the deeds.

I. The first point we have made is well settled in this state, that "where one purchases land, and assumes in his deed to pay off a bond and mortgage of the grantor, to which such land is subject, he thereby becomes a surety in respect to the mortgage debt, which inures in equity to the benefit of the mortgagee, and he may enforce it against the purchaser to the extent of the deficiency, on a bill to foreclose."

Klapworth v. Dressler, 2 Beas. 62.

II. A release from such assumption, executed by the grantor without a valuable consideration, after notice from

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the mortgagee that he looked to the grantee for the deficiency, admitted to have been executed for the express purpose of depriving the mortgagee of such collateral security is fraudulent and void.

It may be insisted, on the authority of *Crowell v. Hospital of St. Barnabas*, 12 C. E. Gr. 650, that the contract was extinguished by the releases executed before the complainant's bill was filed, but it will be observed that, in the case referred to, there was a *reconveyance of the property for a valuable consideration*, and its fairness was not called in question.

In the case now submitted, it appears that three of the defendants (and especially Michael Youngs), after being apprised that the complainants looked to them, or one of them, for any deficiency, for the purpose of avoiding the responsibility and without altering or changing the contract with the grantors, procured from them respectively, the releases, *without consideration*, which Michael Youngs admits were executed for the express purpose of defeating the claim of the school fund for the deficiency. This was simply a fraud; the release was invalid. The mortgagee is subrogated to the rights of the grantors. There was no change of contract between the parties to it which, under the decision of *Crowell v. Hospital of St. Barnabas*, might have prevented the mortgagee from availing himself of the collateral security, but it was simply designed to defeat the equitable right which was admitted to exist without changing the status of the parties in reference to one another. It resembles the case of *Monmouth Ins. Co. v. Hutchinson*, 6 C. E. Gr. 107, where a party who had suffered loss by fire, gave a release to a railroad company which was compromised with them for a portion of the loss, having previously received the amount of insurance from the insurance company. It was held that the release between the insured and the railroad company was a fraud on the insurance company, and, as such, was invalid; that the insurance company was subrogated to the rights of the insured against the railroad company, notwithstanding the release.

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If a deed is executed with an intent to delay creditors, the intention will make the deed fraudulent. *Knight v. Packer*, 1 Beas. 214.

If a deed be made without consideration and in bad faith, it is void as against creditors. *Sayer v. Fredericks*, 1 C. E. Gr. 205; 1 Story Eq. Jur. 353.

"Although a purchaser pay full consideration and have no notice that the property is transferred to defraud creditors, yet, if the circumstances are such that he must have inferred that such was the object, the sale will be set aside as against a creditor." *Green v. Tatum*, 4 C. E. Gr. 574, 6 C. E. Gr. 364.

"A voluntary conveyance, without any other consideration than natural affection, made at the time he is indebted, is fraudulent as against creditors." *Lockyer v. De Hart*, 1 Hal. 450.

"The existence of fraud is often a presumption of law from admitted or established facts, irrespective of motive, and too strong to be rebutted." *Reford v. Crane*, 1 C. E. Gr. 265.

The complainants' right to have their obligation paid by the grantees inured upon the acceptance of the deeds by the respective grantees; therefore, it would seem that any contrivance or combination, between the grantees and grantors, to defeat or deprive the mortgagee of the benefit of any equity which had accrued *after notice* that the mortgagee relied upon such equity or security for the payment of his debt, is a fraud.

The opinion of the court was delivered by

DEPUE, J.

The complainants' bill was filed to foreclose a mortgage for \$9,000, made by John Anderson, dated August 12th, 1871, and payable one year after date. The mortgagor, on the 26th of August, 1871, conveyed the mortgaged premises to Benjamin Anderson, Jr. On April 1st, 1873, Benjamin

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Anderson, Jr. conveyed to Hiram Ackerson. On the 9 of February, 1874, Ackerson conveyed to Michael Young the appellant, who, on the 16th of March, 1875, conveyed to Benjamin A. Anderson. Each of the above-mentioned conveyances was made by a deed containing an assumption by the grantee of the mortgage debt, the same having been deducted from the purchase-money. The bill was filed June 1st, 1877 for the foreclosure and sale of the mortgaged premises. It averred the subsequent conveyances of the mortgaged premises, and set out the assumptions by the several grantees of the mortgage debt, and contained a special prayer for deficiency against the defendants, Benjamin Anderson, Jr., Hiram Ackerson, Michael Young and Benjamin A. Anderson, but not against John Anderson. The appellant, Michael Youngs, and the defendant Hiram Ackerson and Benjamin Anderson, Jr., answered. John Anderson, the mortgagor, and Benjamin A. Anderson, the then owner of the mortgaged premises, did not answer.

Before bill filed, and in anticipation thereof, releases under seal and for a nominal consideration, were executed by John Anderson to Benjamin Anderson, Jr., by Benjamin Anderson, Jr. to Hiram Ackerson, and by Hiram Ackerson to Michael Youngs, releasing and discharging the said grantees, respectively, from the obligation arising from their assumption of the mortgage debts. The chancellor refused to give effect to the said releases, and made a decree of deficiency against all of the said grantees. From this decree Michael Youngs has appealed.

In *Crowell v. Hospital of St. Barnabas*, 12 C. E. Gr. 64, the nature and effect of a stipulation in a deed of conveyance of mortgaged premises, that the grantee should assume and pay the mortgage debt, were adjudged by this court. It was held that such a stipulation was not a contract with the mortgagee, or for his benefit, but was simply a contract with the grantor, for his indemnity, and that the right of the mortgagee to a decree against the grantee

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deficiency, did not result from any fixed or vested right of the mortgagee, arising either from an acceptance by the grantee of a conveyance of the mortgaged premises, or from his obligation to pay the mortgage debt as between him and his grantor, but rested on the doctrine of courts of equity, that a creditor may have the benefit of all collateral obligations which one standing in the situation of a surety for others holds for his indemnity, and may proceed directly against the person ultimately liable, in order to avoid circuit of action. It was also held that, where the mortgagee has acquired no independent equity arising from the dealings between him and the subsequent grantee of the mortgaged premises, and stands exclusively on the engagement of the grantee with his grantor to assume and pay the mortgage debt, he cannot have the benefit of that contract if it has, before bill filed, been released and discharged in good faith by those who were the parties to it.

On a conveyance of mortgaged premises subject to the mortgage, the mortgaged premises become, as between the parties to the conveyance, the primary fund for the payment of the debt, and the grantor, if personally liable for its payment, is considered as a mere surety. *Klapworth v. Dressler*, 2 Beas. 62; *Hoy v. Bramhall*, 4 C. E. Gr. 563. If there be added a personal undertaking by the grantee to pay the debt, his undertaking is a contract with the grantor only, for his indemnity. Thereupon the distinction arises between a trust created for the better securing of the debt, and a contract simply to indemnify a surety against his collateral liability. Where a trust is created for better securing the debt, it attaches to the debt, and inures immediately to the benefit of the creditor, and will subsist until the debt be paid. Such a trust, as a general rule, cannot be extinguished or discharged without the concurrence of all parties in interest. But where a collateral obligation is given, or a trust is created, merely for the indemnity of the surety, and for his protection and benefit only, it may be released and discharged by him as the only person interested in it,

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and his release, as a general rule, will operate as a complete extinguishment, unless, in the meantime, some equitable right in it has arisen in favor of third persons. *Hosmer v. Savings Bank*, 7 Conn. 478; *Thrall v. Spencer*, 16 Conn. 139; *Jones v. Quinnipiac Bank*, 29 Conn. 25; *Dempsey v. Bush*, 18 Ohio St. 37; *Trusdell v. Price*, 2 Stew. 624; *Deering v. Earl of Winchelsea*, 1 Lead. Cas. in Eq. 175, Am. note.

The complainants have not acquired any equitable right in the contract of assumption made by Youngs, arising from their dealings with him. They did not take the mortgage on the faith of his personal responsibility for the debt. He paid the interest on the mortgage debt as it accrued, and there is no proof that he impaired the value of the mortgaged premises during his ownership. On the contrary, the evidence is, that he made improvements on the property, and that it was in good condition when he parted with the title. Nor is there any allegation or proof that the complainants, relying on his assumption of the mortgage debt, were induced, by his conduct or procurement, to alter their situation or forego any of their rights under the mortgage security.

The release of Youngs by Ackerson, his grantor, was executed and delivered before bill filed. When these proceedings were commenced, there was no subsisting right of Ackerson to be indemnified by Youngs against his liability for the mortgage debt, to which the complainants could be subrogated as the representatives of Ackerson. The contract to that effect had been released and discharged by those who were parties to it. That discharge must be equally efficacious to extinguish the complainants' equitable right of subrogation, unless its legal effect can be overcome on some known legal or equitable ground for invalidating, as to third persons, a contract which is valid as between the parties to it. The complainants (respondents) contend that this release originated in a fraudulent intent, and was executed for a fraudulent purpose. If they succeed in hold—

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ing that part of the decree appealed from, it must be upon this ground.

The release was executed after the appellant was notified by the attorney-general that the mortgage was in his hands for collection. It was given for a nominal consideration, and was one of the three releases executed with a view to discharge the three grantees of the mortgaged premises from personal liability for the mortgage debt. The appellant admits that his object in procuring the release was to get clear of personal liability for a deficiency, and to throw it on the present owner of the property. But these facts, standing alone, do not make out a case of fraud. The contract of the appellant was with Ackerson, and whether the latter retained or surrendered his contract of indemnity was a matter for his consideration only, and third persons, though they might, as to him, occupy the relation of creditors, cannot complain of the exercise of his volition on the subject (unless the transaction was illegal) as being in fraud of creditors. *Hosmer v. Savings Bank*, 7 Conn. 478; *Lewis v. De Forest*, 20 Conn. 440; *Jones v. Quinnipiac Bank*, 29 Conn. 25.

If a mortgagor or a subsequent grantee of mortgaged premises has taken from his grantee a covenant for the payment of the mortgage debt, and has become insolvent, his release and discharge of such a right of indemnity, without consideration, to the prejudice of the mortgage creditor, would plainly be in violation of the statute of frauds, and void as being in fraud of creditors. A party who has incurred responsibility for the payment of a mortgage debt, either as a mortgagor or by a subsequent assumption of liability, and has conveyed the mortgaged premises, taking a covenant from his grantee for the payment of the mortgage debt, would have no more right, in case of his insolvency, to divest himself, by a voluntary release, of the covenant of indemnity against his liability for the mortgage debt, to the prejudice of the mortgage creditor, than he would have to surrender, without consideration, a covenant against encumbrances or a promissory note, or to give up property or

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rights of any other description which might be made available, in satisfaction of debts. But this disability of one to do with his own as he pleases, arises only on the happening of insolvency, and when creditors are thereby hindered or deprived of the means of collecting their demands.

In the present case, it appears that John Anderson, the mortgagor, at the time of making his release to Benjamin Anderson, Jr., his grantee, was, and still is, a man of no property, and irresponsible for his debts. For this reason the decree very properly denied effect to his release. But, with respect to the financial ability of Benjamin Anderson, Jr. and Hiram Ackerson, under whose release the appellant derived his discharge, there is no evidence, except that Ackerson owns a farm, and did so when his deed of release was executed and delivered. So far as concerns those two releasers, there is no evidence on which to impugn the validity of their releases. It is true that the release of Ackerson to Youngs was made without any actual consideration. It is also true that a voluntary conveyance by a debtor is void as to existing creditors. But creditors cannot invoke the benefit of the principle unless they are, in fact, hindered or delayed, and the burden of showing such a condition of affairs rests upon the creditor.

It may also be remarked, that the bill of complaint is not framed with the view of raising the question whether these releases were not void as being in fraud of creditors. The bill alleges merely the subsequent conveyances of the mortgaged premises, and the assumption of the mortgage debt thereupon by each of the successive grantees, and, upon these facts, asks a decree against them for deficiency. The bill presents simply a claim, by the complainants, of a right of subrogation which did not exist unless the releases which operated to extinguish that right could be overthrown for fraud. If the complainants intended to rely on fraud as a ground to avoid the releases, so far as their rights were concerned, the bill should have been drawn as to make an issue upon the fraud.

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It may also be remarked that, where there are successive grantees of mortgaged premises, each assuming payment of the mortgage debt, the decree for a deficiency should determine and adjudge the order of the liability of the several grantees, especially where matters occurring between the parties may require a marshalling of securities. As a general rule, where there are successive transfers of the mortgaged premises, with an assumption of the mortgage debt, it will, as between the successive grantees, be cast upon them in the inverse order of the conveyances. But where the intermediate grantees have executed releases to each other, the liability of the parties may be in a different order, even where the releases may be impeached for fraud upon creditors. A voluntary conveyance or release, though it be void as to creditors, is valid as between the parties to it.

On the case, as it is presented, the appellant is entitled to have a reversal of the decree so far as it affects him personally. The reversal will be without costs, the complainants being representatives of the state in this litigation.

Decree unanimously reversed.

STANLEY DAY and wife, appellants.

v.

ISAAC S. ALLAIRE, respondent.

It is discretionary in a court of equity, if the application for rehearing is promptly made, to open a final decree, where there is a meritorious defence, and the defendant (a married woman) has been deprived of such defence by the negligence of her solicitor in obtaining proofs and presenting them to the court.

On appeal from a decree advised by the vice-chancellor, whose opinion is reported in *Allaire v. Day*, 3 Stew. 231.

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Mr. Nelson Runyon, for appellants.

LAW POINTS:

I. The answer, being sworn to and being responsive to the bill, and the allegations of fraud being clearly and unequivocally denied, must be taken as true, unless the circumstances show that it cannot be true. *Morris & Essex R. Co. v. Blair*, 1 Stock. 635; *Brown v. Bulkley*, 1 McCaz. 294; *Bird v. Styles*, 3 C. E. Gr. 297; *Force v. Dutcher*, 2 d. 401. And the uncorroborated testimony of the complainant is insufficient to overcome a responsive answer. *Stearns v. Stearns*, 8 C. E. Gr. 167; *Calkins v. Landis*, 6 C. E. Gr. 133.

II. To make this conveyance void under the act, it must be shown that both parties concurred in the fraud. The grantee must participate in it, or have knowledge of the fraudulent design of the grantor. *Merchants Bank Northrup*, 7 C. E. Gr. 58, 8 C. E. Gr. 582; *Maguire Thompson*, 7 Pet. 348.

III. A debtor in failing circumstances may lawfully transfer a creditor. *Garr v. Hill*, 1 Stock. 210; *Coley v. Cole*, 1 McCart. 350; *Stew. Dig.* 53, *Assignment* (a) 1. And the principle applies with greater force to a trust debt, than to an ordinary contract debt.

IV. A deed taken in the name of a wife for property purchased with her separate estate, is no fraud upon creditors, even if taken in her name to avoid any claim by judgment against her husband. *Quidort v. Pergeaux*, 3 C. E. Gr. 472; *Beals v. Storm*, 11 C. E. Gr. 372.

V. If the house and lot in this case were a voluntary settlement on the wife, and she furnished none of the consideration, and if, at the time, the husband owed the complainant nothing, the complainant cannot impeach the wife's title, without proof that the husband, in making such settlement, intended to contract the debt in question, and defraud the complainant. *Carpenter v. Carpenter*, 12 C. E. Gr. 502.

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VI. If a part only of the purchase price of the premises in question was furnished by the wife, the court will protect her interest, unless she acted collusively with her husband in placing his property beyond the reach of his creditors.

VII. The books of Stanley Day were sufficiently proved to be admitted in evidence, at least for the purpose of explaining or disproving the fraud implied in the alleged admission by Day, that he had falsified them by making his wife appear his largest creditor, on the last leaf of his ledger. The simple inspection of the books will demonstrate the falsity of such admission.

VIII. No presumption against the wife, nor of any participation by her in the fraud of her husband, if he perpetrated any, can arise from the fact that she permitted him to receive and use in his business and invest in her name when opportunity offered, her own personal means and property.

IX. No admissions or declarations of Day regarding the *bona fides* of this transaction, not made in the presence of his wife, can bind her, or affect her vested rights.

X. As all the alleged admissions in this cause are verbal—not one in writing—the evidence of them should be received with great caution. Evidence of this kind, consisting in the mere repetition of oral statements, is subject to imperfection and mistake, and its value is much diminished if a long time has intervened between the date of such admissions and the date of the evidence of them.

XI. Although Mrs. Day had no personal knowledge that the New Market property was purchased with the proceeds of her West Farms property, and all the knowledge she possessed on that subject was derived from her husband, the burden of proving that the purchase-money therefor was provided by her husband, and was his own individual money, is on the complainant, and her information, derived from her husband on that point, is good to rebut and repel

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the allegation of fraud, until the complainant affirmatively proves that the consideration of such purchase was furnished by the husband.

XII. If Day was insolvent on May 24th, 1870, and Mr. Day knew it—and if this purchase was made to keep Day's creditors from obtaining any lien on the land, or on the consideration paid for it—it is no fraud on Day's creditors provided it was purchased with Mrs. Day's money. It is the property of the debtor (and not that of any other person, though in his possession) that must go to satisfy the debt.

XIII. The negligent management of the appellants' case by the solicitor, and his desertion of it, after the proofs were taken, entitle the appellants to the favorable consideration of the court.

POINTS OF FACT:

The reversal of this decree is asked for on two grounds. First, surprise; second, merits.

No question is made as to the first point. We insist the second is shown by the following propositions of fact:

I. The defendant Day was not indebted to complainant on May 24th, 1870, when the deed was taken.

II. There is no evidence that Day was insolvent on May 24th, 1870. Neither the complainant nor any of his witnesses swear to it. All the conversations with Day concerning his insolvency were after the purchase of the New Market property. The complainant believed him solvent up to the time he endorsed the first note on which the judgment was founded, and that was December, 1870.

III. There is no satisfactory proof that Mrs. Day knew of his insolvency at the date of the deed, even if he then was insolvent; and no proof that she knew the purchase was made to delay or defeat his creditors, if it was so made.

IV. The house and lot were purchased with the money and property of Mrs. Day, being the proceeds of the West

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Farms property. This appears, first, by the sworn answer of both defendants; second, by the letters (if admitted) of Beck, Mrs. Day's brother; third, by Day's books; fourth, by the direct evidence of Mrs. Day, as to receiving \$11,000 from England, and the purchase with it of the West Farms property; fifth, by the evidence of Bellamy, the New Market purchase was the mere transfer of an investment from New York to New Jersey.

V. The West Farms property stood in the name of Mrs. Day, and was purchased in 1867 and 1868, with her own money. The point is made, not that Mrs. Day had no money, then—the witnesses all swear she had money—but that she did not have £1,700, as she swears. The admissions of the wife are attempted to be shown—that she did not receive so much money from England as she expected; that she had lost money by the blowing down of a wind-mill. This may easily be reconciled by remembering that she received money several times from England. Bellamy swears that Day received money at various times from England—over £1,500. There can be no reasonable doubt that the West Farms investment was made with Mrs. Day's funds. But, even if made with her husband's funds, the complainant cannot question it now.

VI. Day never, in fact, made any false account in his books, making his wife his largest creditor. If Day made any such admission as that, he admitted a falsehood; and the best evidence of whether he admitted a lie or the truth, is the inspection of the books themselves. We are anxious to have the court inspect the books, and are willing that this cause shall stand or fall by that test. But if he made the declarations, and actually fixed up his books to make his wife his largest creditor, is Mrs. Day to suffer thereby?

VII. The evidence, by the answer of Day, is not overcome by the evidence produced by the complainant of his admissions.

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(1st) Mrs. Day had an opportunity to go on the stand and make her statement. Stanley Day had not. Why, I cannot tell. Whether his counsel was treacherous or merely stupid, does not appear. Day wants to have an opportunity of testifying, and always wanted it.

(2d) Kate Milner, who proves the greater part of the admissions, was sworn twice—once in 1873, and again in 1874. She assumes to remember the details of mere casual conversations, in which she had no personal interest, had in 1868, 1869 and 1870. Her evidence should be carefully scanned.

(3d) These alleged admissions do not, on a careful examination, prove the points following:

(a) They do not prove that Day was insolvent when the New Jersey property was purchased.

(b) They do not prove that one dollar of the New Jersey purchase was the personal money or property of Stanley Day.

(c) They do not prove that Day secreted, invested or transferred a dollar of his money to keep it from his creditors.

(d) They do prove that the Boice property was purchased by Day, and the title put in Mrs. Day's name; and that the title to the adjacent lot was at first taken in Day's name, and afterwards conveyed to his wife through Howie.

(e) They do prove that Day, in 1870, owed money, besides what he owed the complainant; that some of his debts were of a fiduciary character; that he was afraid he would be arrested in New York, and was anxious to get to New Jersey.

(f) They also prove that he was afraid that an attempt would be made to take his wife's property for his debts, and this suit justifies his fears.

(g) The admission testified to by Mr. Milner, that Day said his object in going to New Jersey was to save his property in case of his failure, was made in 1871, long enough

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fter his purchase. And he may have called, and probably did call, his "wife's property," his property.

(h) If we admit what is perfectly manifest in this case, that Day actually feared his creditors might take his wife's property for his debts, it explains many of his admissions and much of his suspicious conduct.

(i) It is proved that he said he took \$1,100 out of his business to pay on the New Market property. But he had his wife's property in his business and in charge. When he bought that property, he had charge of the entire proceeds of the West Farms sale. If he took \$1,100 of his own money to pay on that purchase, he had five times that amount of his wife's money in his hands.

Boice actually took part of his pay for that property, in his very clothing exchanged with Bradford for the West Farms property.

VIII. Is Mrs. Day to suffer the penalty of being obliged to pay her husband's debts, because she permitted him to receive, use, invest, and ostensibly treat as his own, her money? There is no proof that he used it to acquire any real or fictitious credit. He never invested a dollar of it in his own name, so far as the proof shows. The complainant does not say he trusted Day on account of any credit which the possession of his wife's money gave him. As a matter of fact, his wife's money was always invested in *her own name*, notoriously and openly, excepting the time intervening between the sale of the West Farms property and the purchase of the New Jersey property (about three months), and the complainant's debt was not contracted during that three months.

IX. The complainant's right to recover rests, and must rest, on the theory that the West Farms investment was a voluntary settlement by Day upon his wife. If he admits the West Farms property was Mrs. Day's, his case is gone. He must, therefore, insist not only that it was a voluntary settlement, but that it was fraudulently made, with a view

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to this future indebtedness and to protect his property from his future creditors.

It is insisted that the evidence is abundant that this property was purchased with Mrs. Day's money; but if it should be conceded that the husband himself furnished the means to purchase it, there is no evidence in the whole case going to show that it was fraudulently done, and with a view to protect it from future creditors. The court will not assume without proof, that it was fraudulently made, and then reverse the rules of law in proving fraud.

REPLY TO POINTS OF RESPONDENT:

(1st) If the affiants were residents of a foreign country at the time the answer was sworn to, the oaths were properly taken before a consular agent.

Mrs. Day, in her testimony, swears that she had resided in Stratford, Canada, since January, 1873, and she was therefore, a resident of a foreign country at the time the answer was sworn to. The presumption is, her husband resided there, also. The point of the decision in 2 Gr. Ch. 485, cited by respondent, is, that the place of taking an affidavit is a matter *in pais*, and, if legally questioned, must be proved *aliunde*. But no objection was taken to the sufficiency of this affidavit, in the whole history of this case, and, it is submitted, it is now too late to raise it.

(2d) As to the point that the "appellants have taken no oath as to the truth of their answer," the reply is, they took the ordinary oath and the one prescribed by the forms. There is nothing in the case of *Brown v. Bulkley*, 1 McCart. 299, to sustain the point for which it is cited.

Mr. A. Zabriskie, for respondent.

I. If the conveyance was made to the appellant, Mr. Day, in order to hinder, delay or defraud, or in any way to put off the creditors of the appellant, Mr. Day, the transaction is fraudulent and void, under whatever pretence

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act may be cloaked. And this applies both to antecedent and subsequent creditors. *Green v. Tatum*, 4 C. E. Gr. 105; *Belford v. Crane*, 1 C. E. Gr. 271; *Beekman v. Montgomery*, 1 McCart. 108.

II. Does the evidence show facts from which the conclusion will be made that the transaction was fraudulent?

First—The evidence introduced by the complainant.

(a) It is shown that, in 1869 (the conveyance was made in 1870), the respondent loaned Stanley Day \$5,000 in United States bonds.

(b) The answer admits that Stanley Day was indebted to respondent in another sum of \$4,000, on which judgment was recovered, and that Day had nothing in this state on which to levy.

(c) It is shown that, at or about the time this property was put in the name of the wife of the appellant, Stanley Day, he was insolvent, and was expecting to fail any day, and was desirous of getting out of the state of New Jersey, to escape his creditors and save his property.

(d) That, after Stanley Day became insolvent, he, by his own admissions to two persons, had fixed his books so that his wife would appear not only as a creditor, but his largest creditor.

(e) That the appellant distinctly admitted that he desired all his property to be in his wife's name, as he expected to fail, and wanted it to be out of the reach of his creditors.

(f) The answer admits that the property cost over \$6,000, and two witnesses prove that the appellant, Mrs. Day, admitted that she had only about \$1,700.

(g) It is further proved that the appellant, Stanley Day, took money from his business to pay for this property.

Second—The evidence of appellants.

The appellants rely for their defence to the bill of complaint, on (a) their answer; (b) the testimony of Mrs. Day and John Bellamy; (c) the books of account of the appellant, Stanley Day.

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(a) The answer.

(1) The answer cannot be used as evidence, but can only be treated as a pleading, as there is nothing on the face of the affidavit to show the court that the person before whom it was sworn was authorized to take an affidavit by the law of this state. It was taken before a United States consular agent, who is only authorized to take the affidavits of those being in foreign countries. And neither the caption of the affidavit nor the jurat shows where it was taken.

There must be something on the affidavit to show that the officer was *prima facie* authorized to take it. *Perkins v. Collins*, 2 Gr. Ch. 485.

The appellants have taken no oath as to the truth of their answer, and it is the oath that gives weight to the answer. *Brown v. Bulkley*, 1 McCart. 299.

(2) The weight of the answer, as evidence, is entirely overthrown:

(a) By the appellant's (Stanley Day's) proven admissions in direct opposition to the facts, or some of them, stated in his answer, and his distinct acknowledgment of having altered his books to defraud his creditors, taken together with his failure to appear as a witness to substantiate the truth of his answer, and to either contradict or explain his proven admissions contrary to his answer.

(b) By the cross-examination of Mrs. Day, it appears that, when she swore to the truth of that answer, she had no personal knowledge of most of the statements contained therein, but her knowledge was derived from what others told her. An answer of this kind is entitled to no credit. *Bent v. Smith*, 7 C. E. Gr. 567; *Stevens v. Post*, 1 Beas. 408.

(3) The answer is overcome by the oath of more than one witness.

(b) The testimony of Bellamy and Mrs. Day.

(1) Mr. Bellamy's testimony is brief, and, on cross-examination it appears, was made up wholly of what he had learned from others, chiefly from Stanley Day.

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(2) The appellant's (Mrs. Day's) testimony is given at some length. On her direct examination, her testimony is plain and clear. She says, in substance, that the New Market property was purchased with the proceeds of clothing derived from the sale of the West Farms property, which was purchased with money she received from England. This is a straight story. But when we turn to the cross-examination, on reading it from beginning to end, we find that it is wholly made up of admissions that everything she has been testifying to in her direct examination was derived wholly from information given her by her husband. She had absolutely no personal knowledge of the transactions she was testifying about. Her knowledge concerning the money from England, and what became of it, except as derived from her husband, amounts to nothing. Personally, she absolutely knew nothing as to whose money was used in the purchase of either the West Farms or New Market property. The only person who knew about these transactions, was the appellant, Stanley Day, and, although he had two years so to do, he has failed to appear as a witness. Her testimony is utterly worthless; his might have been of value to one side or the other.

It will be observed that, although Mrs. Day came from Canada to be examined, she left all the deeds, receipts and other papers relating to these transactions, in Canada.

(c) Mr. Day's books of account.

These books were not admitted as evidence by the court below, and very properly so, as they were only marked for identification, and neither proved nor offered in evidence.

The opinion of the court was delivered by

SCUDDER, J

This appeal is taken from the order of the chancellor, made on the advice of the vice-chancellor, discharging the order to show cause why the final decree entered in this

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cause should not be opened, and the defendants let in to be heard and make defence by counsel.

The petition of Maria Isabella Day, wife of Stanley Day, one of the defendants in the above cause, shows that, on October 10th, 1872, the complainant, Isaac S. Allaire, filed a bill to subject to the lien of a judgment for \$4,704.59, which said Allaire had obtained against her husband, certain lands in Middlesex county, which, it was alleged, had been conveyed to her in fraud of her husband's creditors. The defendants answered the bill of complaint, under oath, denying the fraud, and alleging a full consideration paid by the wife, through the agency of her husband, from money received by him belonging to her separate estate. The petition further shows that a solicitor of the court was duly retained to defend the action; that testimony was taken upon both sides; that the solicitor abandoned the case without the knowledge or consent of the defendants, omitting and refusing to take the testimony of several material witnesses, and did not present the evidence taken, or argue the cause before the chancellor, although his fees, costs and charges were fully paid; that, by such neglect, the complainant's case alone was heard, the defendants' testimony was not read, and they were not represented before the chancellor. With these disadvantages, the decree against them which they pray relief in their petition was made against them.

It was properly held that this petition showed surprise, and that the solicitor's misconduct was a breach of duty which the defendants were not bound to anticipate or guard against.

Kemp v. Squier, 1 Ves. 205, says that it is discretionary in the court of chancery to set aside enrolled decrees on circumstances, and that, in that case, where there was an infant, who continued such until near the time of hearing, and was beyond seas, where the cause was neglected by the solicitor, and the merits of the case were not heard, the petitioner was entitled to have the enrollment set aside.

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is case cites *Robson v. Crowell*, before Lord King, where a person left money with his solicitor to fee counsel, and went beyond sea. The solicitor neglected to employ counsel, and the bill was dismissed, with costs. It was held a default, and the court opened the enrollment, on payment of costs, and gave the complainant leave to show merits and apply to rehear.

The court of chancery has discretionary power, even after enrollment, to open a regular decree obtained by default, for the purpose of giving the defendant an opportunity to make a defence on the merits, where he has been deprived of such defence, either by mistake or accident, or the negligence of his solicitor. *Millspaugh v. McBride*, *Paige* 509; *Brinkerhoff v. Franklin*, 6 C. E. Gr. 334; 2 n. Ch. Pr. 1030.

The complaint here is, that the merits of the case were not presented to the court or discussed before the decree was pronounced, and that not by the laches or fault of the petitioner, but by the neglect of the solicitor employed by her, upon whom she had the right to rely. The first case cited above was that of one who had been an infant, and went beyond sea, while he was suffering from the neglect of his solicitor. Here we have the case of a married woman, whose rights are just as carefully guarded by a court of equity, who has been undefended while her husband's creditor was charging fraud upon her, and attempting to take from her lands which, she alleges she is prepared to show, were purchased by her separate moneys. It is certainly within the discretionary power of the court to grant relief in such a case, if the defence shown be meritorious, and prompt application is made for its aid.

There has been no unreasonable delay in the petition in this case, and the only question that remains is, whether the petitioner has shown a meritorious defence. The facts are perfectly set forth in the proofs that were taken for the defendants, which were not presented to the chancellor before the decree was made, but were offered with the peti-

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tion for rehearing. These proofs are, manifestly, incomplete. They show, however, that Mrs. Day had property in England, independent of her husband; that it was received at different times by him, and, as she intended and supposed, invested for her, and in her name; that property in England, belonging to her, was sold about July, 1867, and remittances therefor made to her husband for her; and that, with these and other moneys from her father's estate, she claims that real estate was purchased, in her name, at West Farms, New York, in 1867 and in 1869, for which deeds were given to her. If this be so, she had these lands prior to her husband's indebtedness to this complainant, and if the proceeds of sale of this real estate in New York were subsequently invested in lands in this state, in good faith, she has a title which cannot be disturbed by her husband's creditors.

The bill of complaint charges that, on May 24th, 1870 Stanley Day was indebted to the complainant, Isaac Allaire, in the sum of about \$5,000, and that, on June 1st, 1871, he became indebted to him in the further sum of \$4,000; and, on November 13th, 1871, he recovered a judgment, in the supreme court of this state, against Day, for \$4,704.59, being the amount of his indebtedness second above named, with interest and costs. Why no claim or judgment was had for the alleged prior debt of \$5,000, does not appear. The complainant shows, by proofs, that Day failed in January, 1871; that there were admissions made, by Mr. and Mrs. Day, that the property belonging to Mrs. Day in England was not sufficient to purchase the property at West Farms, and that these lands were sold in New York, and invested in New Jersey, to defeat the New York creditors of Stanley Day. It is needless to comment on the uncertainty of such evidence, and its denial by Mrs. Day. But Mr. Day was not called to meet these alleged admissions, nor to show the disposition made by him of his wife's property, although it appears that he received all of her moneys, and, as she says, invested them for her. She

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estifies as to what she heard and understood of such
nent, and this is weighed as hearsay, and slight evi-
in her favor. She alleges, in her petition for rehear-
at she wished him and other witnesses to testify for
it her solicitor said the case was plain in her favor,
fused to call them; that he then abandoned the suit,
ed from the state, ceased to practice in our courts,
t her and her husband undefended.

not proper to decide the completeness of the defence,
s can only be done after all the evidence has been

and more especially is that the case where there is
ge of fraud, which is denied, as in the present action.
manifest that there is a meritorious answer to this
of the complainant, and that the defendants have not
eard on the testimony of their witnesses and the due
tation of their case in court, because of the gross
and abandonment of their solicitor, without any
on their part.

is not a case where the solicitor has erred in judg-
nerely in conducting the cause, nor is it one where
ative evidence only has been excluded; but it is the

and neglect to present to the court most important
ny, both oral and written, which might have had a
ling weight in the mind of the chancellor, and the
lding of it was a surprise and fraud upon the rights
e defendants and the petitioner who now asks for

ay judgment, the rule to show cause why the final
should not be opened should be made absolute, the
eversed, and the case be remitted for further proofs
hearing, on payment of the costs of entering the
and the proceedings subsequent thereto, in the court
and that the appellant recover costs on this appeal.

Decree unanimously reversed.

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CORNELIUS HANNON, appellant,

v.

JOHN MAXWELL, respondent.

In a replevin suit brought by M. against C. H., after a dissolution of his partnership with C. H. Jr., alleging fraud in obtaining the goods replevied, a judgment was given for C. H. Afterwards, in trover against C. H. Jr. for the same goods (additional evidence of the fraud having been discovered), M. obtained a verdict. An injunction was thereupon issued, restraining C. H. from further proceedings on a judgment obtained by default, by C. H. against M. and his sureties on the replevin bond.—*Held*, that the injunction ought to have been refused, (1) Because the bill did not show *when* the additional evidence of fraud was discovered, and that it was too late to apply at the same term of court (as required by rule) for a new trial in the replevin suit, and (2) That such evidence was material, relevant and not cumulative.

On appeal from a decree of the chancellor, whose opinion is reported in *Maxwell v. Hannon*, 2 *Stew.* 525.

This is an appeal from a decree overruling a demurrer to a bill filed to restrain an action at law, and for general relief. The bill substantially discloses the following case: Cornelius Hannon, the defendant in the suit, was, with his son, Cornelius Hannon, Jr., engaged in buying and selling stone. On December 15th, 1875, they dissolved partnership, when the son made a pretended purchase of his father's interest in the business, for the consideration of \$11,750, giving his own note to his father for that amount. The son thereafter applied to Maxwell, the complainant, and bought four bills of goods (stone), of the dates of September 20th, 1876, September 27th, 1876, October 14th, 1876, and October 17th, 1876, respectively, amounting, in all, to the sum of \$4,116.35. This stone was taken to the yard of the son. On the 14th of October, 1876, the son executed a chattel mortgage to his father, on all his property, except the coal then on hand, to secure the payment of \$3,000.

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he same day, the father brought an action on the note \$11,750, judgment was duly entered, and a levy was made upon all the son's property on November 18th, 1876, day after the last bill was purchased from Maxwell.

Maxwell, believing that the chattel mortgage, the judgment and the purchase of the stone was a plan devised to defraud him, brought an action of replevin against the sheriff, which was tried at the Essex court, at the April term, and resulted in a verdict for the sheriff, and against Maxwell, because Maxwell was unable to prove the facts which he supposed to exist, and, at the trial, the Hannon produced a schedule of the firm property at the time of dissolution, which showed the consideration of the note to be \$11,500, and the son swore that he had since lost \$7,000 by disbursements and loans made to one William R. Drake.

About the same time, an action of trover was brought by Maxwell against Hannon (the son) for the same stone, which action was tried at the Essex circuit, at September term, 1877, in which action Maxwell, having obtained further testimony in relation to the transactions between the father and son, was enabled to show, by satisfactory proof, that the note for \$11,500 was without consideration; that the schedule was false, as also the story that the son had lost by the said Drake, \$7,000. The verdict was for Maxwell and against said Hannon.

Ernestus Hannon has brought an action on the bond given in the replevin suit against the sureties thereon, and judgment has been entered by default, and was entered without the knowledge of Maxwell.

The prayer of the bill is, that all proceedings upon this judgment may be enjoined, and for general relief.

W. Stevens, for appellant.

The appellants, who are the defendants below, have answered to the complainant's bill, because it fails to show the matter over which equity has jurisdiction.

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I. It avers that the complainant prosecuted, in the ~~Essex~~ circuit, an action of replevin; that the cause was ~~tried~~ before Mr. Justice Depue and a jury, and that the jury gave a verdict against the complainant. The affidavit annexed to the bill, states that a new trial was sought by complainant, and *denied*. The effort is, to prevent the appellant (the defendant below) from reaping the fruits of the verdict in his favor; but the prayer of the bill does not point out the precise relief sought; it asks for nothing more than a temporary restraining order, and general relief.

II. As the complainant could hardly seek a perpetual injunction (to grant which, the court would have to pass upon the very question which the jury have already considered, and to reverse their finding), we may conjecture that he seeks a *new trial*. This is evident from the fact that the fraud alleged is fraud in the sale of the stone, and not fraudulent use made of the machinery of the court of law to obtain an inequitable advantage.

III. How little such a proceeding is resorted to in equity appears from *Larabrie v. Brown*, 1 DeG. & J. *204, where Turner, L. J., says "such bills (for new trial) appear to have been filed in former times, but I believe no such attempt has been made for the last two or three hundred years." See also *Terrell v. Higgs*, 1 DeG. & J. *392.

To succeed, the complainant must show, not merely that the jury were wrong, but some special ground of equity. Otherwise, a trial at law would settle nothing. This special ground of equity is the great jurisdictional fact authorizing the court to lay hold of the case.

IV. Now, while conceding that, in very special circumstances, a court of equity may interpose to grant a new trial, the complainant must, it is submitted, show affirmatively certain facts, which are of the very essence of his case, viz.:

(1st) That he has newly-discovered evidence, setting it forth.

(2d) That such evidence is not cumulative.

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(3d) That he could not have availed himself of it at the trial at law, by the exercise of proper care and diligence.

(4th) That he did not discover it till it was too late to apply for a new trial in the ordinary tribunal.

Cairo & Fulton R. R. v. Titus, 12 C. E. Gr. 106, affirmed, as to the law, in 1 Stew. 269.

If the bill fail to show affirmatively one of these four facts, it is fatally defective; but, in point of fact, it does not show any.

V. The chancellor puts the right to relief on the ground of conspiracy and perjury, but these are no grounds for equitable interference. *Vaughn v. Johnson*, 1 Stock. 73; *Smith v. Lowry*, 1 Johns. Ch. 320.

VI. Again, it is respectfully submitted, that the chancellor has failed to discriminate between such frauds as a court of equity may take cognizance of, and such as are within the exclusive jurisdiction of a court of law. Says the master of the rolls, in *Harrison v. Nettleship*, 2 Myl. & K. 423: "A court of equity has no jurisdiction to relieve a plaintiff against a judgment at law, where the case in equity proceeds upon a ground equally available at law and in equity, unless the plaintiff can establish some special equitable ground of relief."

VII. The complainant is not entitled to relief for another reason. He alleges, that he recovered judgment against C. Hannon, Jr., in trover, for the value of the goods delivered to him. This judgment transferred the title to the goods, and vested it in C. Hannon, Jr., and, being so vested, the judgment in replevin must stand.

That the effect of a judgment in trover is to pass the title to the defendant, appears from the following cases in New Jersey: *Wooley v. Carter*, 2 Hal. 85; *Thompson v. Morris Canal*, 2 Harr. 484; *Outcalt v. Durling*, 1 Dutch. 443, 449. Such is the law in Pennsylvania (*Fox v. Prickett*, 5 Vr. 13), in Rhode Island (*Hunt v. Bates*, 7 R. I. 217), and in England, in long series of decisions. *Keilway* 58 B; *Bruen*

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v. *Wotton*, Cro. Jac. 73; *Adams v. Broughton*, 2 Str. 107; *King v. Hoare*, 13 M. & W. 504; *Buckland v. Johnson*, 15 B. 145. See also 3 *Dane's Abr.*, ch. 77, art. 1, § 2; 1 Ch. Pl. *89.

In the note to 2 *Kent. Com.* *388, are some cases which appear to hold that satisfaction of the judgment is a necessary. But even in New York the law does not seem wholly settled. In *Thurst v. West*, 31 N. Y. 211, Ch. Justice Denio says, a recovery for the conversion would change the property. See also *Bank of Beloit v. Beale*, N. Y. 473.

Mr. Frederick Frelinghuysen, for respondent.

I. The appeal is not properly before this court.

II. Before the defendants appear before this court, they must purge themselves of their fraud.

III. This court can relieve in just such cases as these.

I. This appeal is not properly before the court.

The order appealed from was interlocutory, that the defendants answer in forty days. The order was entered July 16th, 1878, and notice of appeal therefrom was filed July 24th, 1878; but the petition of appeal was not filed nor deposit made, until November 2d, 1878. We submit that the filing of the notice of appeal is not such appeal as the statute requires.

An appeal is an act by which a party submits to the decision of a superior court, a case which has been tried in an inferior tribunal. *Leake v. Blakely*, 34 Vt. 134; *Harliard on New Trials* §§ 700, 703.

How is such appeal made? By the appellant bringing the case on before the court, by petition and deposit.

Chancery Rule 121 obliges the appellant from a final decree to present his petition of appeal at the next term after filing his notice of appeal; so that, although appeal may be taken from a final decree at any time in three years it is restricted so that, when once notice of appeal is filed

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the petition must be presented at the next term ; there is no such restriction on appeals from interlocutory orders, and, unless the petition be the appeal (for there is no rule directing the proceedings, except that it must be brought within forty days), there is no limit ; and surely the petition alone makes the appeal—that alone submits the case to the superior court. The notice of appeal brings nothing before the court so that either the court or the respondent could treat the case. The notice says the appellant appeals. On simply a notice, even on appeal from final decree, where three years are allowed, the court would consider the appeal waived, unless the petition be filed, according to the rules, by the next term.

On an interlocutory order, appeal must be taken in forty days from the filing of the order. *Rev. Chancery, § 114.*

Appeal from an interlocutory order is statutory entirely—not known at common law. *Hammond v. The People, 32 Ill. 441; Ladow v. Groom, 1 Den. 429.* There the affidavit was defective in form, and, the statute requiring an affidavit, the appeal was dismissed.

The following have been held interlocutory orders :

Order overruling a plea. *Rutherford v. Fisher, 4 Dall. 22.*

Order refusing to dismiss a bill for want of equity. *20 Ala.*

~~45.~~ Overruling a demurrer. *Blakely v. Fish, Hempst. 11.*

This is a case overruling a demurrer, and appeal was not taken within forty days, and should be dismissed, as was done in *Newark Plank Road Co. v. Elmer, 1 Stock. 760.*

II. As to necessity of defendants purging themselves of the fraud.

This is on demurrer to the bill (admitting all the facts), for want of equity in the bill.

A motion to dissolve before answer filed, for want of equity, will not be allowed when the bill charges fraud. *Shotwell, adm'r v. Smith, 5 C. E. Gr. 79.* That was a suit enjoining suit at law until discovery of facts was made by defendant, and charging that the obligation sued on at

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law was fraudulent. Court refused to dissolve injunction on motion before answer was filed.

The want of equity must be fully and fairly met by the defendant, and everything taken against the defendants which they might have answered. *Park v. Spurgin*, 3 Ired. Eq. 153; *High on Inj.* § 882.

When there are two defendants charged with fraud, the court will require both to answer before dissolving injunction, and require a positive denial from all the defendants before dissolving an injunction granted on the ground of fraud. *High on Inj.* § 914; *Price v. Clevenger*, 2 Gr. Ch. 20; *Scull v. Reeves*, 2 Gr. Ch. 84.

And even if the demurrer is properly considered here, under the general demurrer all the claims in the bill must be overruled. The entire complaint must appear outside of the jurisdiction of the court. *Boston Water Power Co. v. Boston & Worcester R. R. Co.*, 16 Pick. 512; *Kimberly v. Sells*, 3 Johns. Ch. 467.

III. This court can relieve in just such cases as these.

We find in *Story's Eq. Jur.* § 184, that this court has jurisdiction over fraud which is beyond the reach of the courts of law.

Equity will do it by reason of the inherent authority growing out of the principles of equity, and extending itself over courts of every description. *Van Meter v. Jones*, 2 Gr. Ch. 520; *Boulton v. Scott*, *Id.* 231; *Davis v. Headley*, 7 C. E. Gr. 115; *Reeves v. Cooper*, 1 Beas. 223. Also in cases of concealment or fraudulent representation. *Conover v. Wardell*, 7 C. E. Gr. 492; *Stover v. Wood*, 11 C. E. Gr. 417.

In *Hoyt v. Hoyt*, 12 C. E. Gr. 399, it is held to be the peculiar province of equity to determine such questions of fraud.

A prevalent difficulty in such remedy has been proof of the fraud; here it is demonstrated in the second verdict, and is undenied here on demurrer.

Nor is there any doubt of the authority of equity to look into the judgments of courts of law and set them aside, or restrain them on ground of fraud. *Van Meter v. Jones*, 3

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Ch. 520; Glover v. Hedges, Sax. 113; Oakley v. Young, Cal. Ch. 453; Powers v. Butler, 3 Gr. Ch. 465, authorities cited. *Moore v. Gamble, 1 Stock. 246; Tomkins v. Tomkins, 3 Stock. 512; Stratton v. Allen, 1 C. E. Gr. 229*. A judgment at law can only be impeached in equity for fraud and concoction.

Equity originally granted new trials. Now it will not grant new trials when the court of law can do it. *Powers v. Butler, 3 Gr. Ch. 465*. If, however, facts could not, for technical or by rigid rules of law, be used, equity will relieve. Where new trial cannot be granted by the court of law, and the weight of the newly-discovered evidence has been demonstrated by the verdict in trover.

Hairo R. R. Co. v. Titus, 1 Stew. 269, reverses the decision where relief is refused if the new evidence or the concealment could have been elicited on cross-examination. Still we do not come even within that condition, for we could not elicit on cross-examination, the two conspirators swearing solemnly and persistently.

That case holds that possession and concealment of a contract at the trial by one side, exonerates the other side from discovery, even though it might have been brought out on cross-examination. Concealment was enough. Here we have not concealment, but a thousand times worse. We have fraud and conspiracy, covered and hidden by falsehood and perjury. The one case relieves against a failure to disclose, the other against false disclosures and fraudulent conspiracy.

The case of *Henwood v. Harris, 12 C. E. Gr. 247*, sustains this position, also. It holds that chancery will stay suits at law, and will do it without remitting to law, where the law proceedings would be summary and result in irreparable injury.

When facts material to establish defence have been discovered since trial, which the defendant could not sooner have discovered with due diligence, or had been fraudulently concealed (by false swearing), relief may be allowed.

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Batzell v. Randolph, 9 Fla. 366 ; *Bateman v. Willore*, Lef. 204.

In cases where cognizance cannot be taken at law will interfere, as where verdict was obtained by fraud which the party has an unconscientious advantage. *boro v. Gifford*, 2 P. Wms. 424.

Sometimes equity relieves where the plaintiff might have protected himself at law, as finding a reversal after verdict.

Fraud being shown by which facts were concealed will afford relief by opening the case and allowing a new trial or by perpetual injunction. *Wierich v. Dezoya*, 2 G

That the defence should have been made at law is a good ground for dissolving injunction, where the judgment was obtained through such fraudulent and deceitful representations as prevented the complainant from gaining his rights in that legal tribunal. *High on Inj.* § 109.

The defendants claim that, at the replevin suit, Cornelius Hannon, Sr. proved the sale to Cornelius Hannon, co-defendant, and the verdict was given in his favor. They insist that no fraud appeared in the purchase of the stone, and consequently the purchase was good. The sale stood, and, therefore, the execution of the writ against Hannon against his son properly levied on the stone.

We reply, that subsequent to the finding in the replevin suit, we show the purchase of the stone was fraudulent. The trial of the replevin suit was likewise fraudulent. We show fraud both in the purchase of the stone and in the verdict of the suit, and the trover suit demonstrates it.

But the defendants say the recovery in the trover suit estops us from taking any further proceedings. We say the trover and the replevin are on the same ground of fraud. When fully shown, we recover, because the sale was void—void because Hannon and his Son had conspired to cheat us, and we claim that we will take no advantage of the fraud we have demonstrated. If the injunction is not retained, they will have an ad

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through their fraud, of all the goods replevied and for which they now are suing the bond. And this court of equity has cognizance of the fraud, which appears not only in the purchase, but also in the trial.

Holmes v. Steele, 1 Stew. 173, holds that if defendant had fair opportunity to be heard at law, equity will not enjoin the judgment, on the ground that it is unjust or that the court erred. We do not claim the court erred, but insist that the evidence, which was solely in the breast of the Hannon, has since been demonstrated to be false, and we submit that equity will interfere where defendants had an unconscientious advantage.

Unlike the case of *Holmes v. Steele*, 1 Stew. 173, we have not had a fair opportunity to be heard at law, and we do not claim the court erred. We submit we were wronged by the false evidence in the replevin trial, so boldly given and so skillfully concealed that we could not contradict it, and we ask this court to stop the success of their fraud by this injunction, and the court may set off from the trover verdict the amount of the goods replevied.

Cairo & Fulton R. R. Co. v. Titus, 12 C. E. Gr. 102, even holds that equity will relieve a party against a judgment at law when its justice can be impeached by facts of which he was prevented from availing himself by fraud, but was not proven. This case, we submit, is just such a case, and is demonstrated.

The opinion of the court was delivered by

REED, J.

It is apparent that, in the examination of the facts disclosed in this bill, for the purpose of ascertaining the existence of the equitable relief, if any, growing out of them, we must regard the present as a bill for a new trial. Although there is no specific prayer for this remedy, but, instead, a general prayer for relief, and a special prayer that the proceedings upon the judgment upon the replevin

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bond may be enjoined, yet it is manifest that there is no equitable ground disclosed in the bill which would draw the final adjudication of the matter determined by the first verdict, into this court, and so deprive the judgment creditor, not only of the fruits of his verdict as it stands, but of the privilege of retrying it in the original forum. There is disclosed no defence peculiar to courts of equity and unavailable in the common law tribunals. Everything stated in the bill was as pertinent in the trial at the circuit, as a defence, as it could be in any court, and the question then remains, whether the facts disclosed in the bill are such as to entitle the defeated party to a retrial, so that the verdict may be based upon the new and radically different presentation of testimony, which, the complainant claims, will attend a second trial.

The question extends further than this, however, for it is, whether a court of equity will compel such new trial by enjoining the further proceedings upon the present judgment. The rule which restricts the interference of courts of equity with verdicts or judgments, in courts of law, has ever been one of great strictness. Before the courts of common law exercised the privilege of granting new trials, the court of chancery interfered with reluctance, and the suits of this character in the English equity courts are not numerous. The strictness with which these courts adhere to this rule is apparent from a reference to the few cases where the subject has been considered. *Curtis v. Smallridge*, 2 *Freem. K. B.* 175; *Tovey v. Young*, *Prec. in Ch.* 193; *Richards v. Symes*, 2 *Atk.* 319; *Sewel v. Freeston* 1 *Ch. Cas.* 65.

In *Bateman v. Willore*, 1 *Sch. & Lef.* 201, Lord Redesdale, in the Irish court of chancery, held it to be unconscientious and vexatious to bring into a court of equity a discussion which could have been had at law.

In *Smith v. Lowry*, 1 *Johns. Ch.* 320, Chancellor Kent cites these cases with approval, and, in the case he was then considering, refused to grant an injunction to stay proceedings on a judgment at law, applied for on the ground that

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the defendant was prevented by public business from making due preparation for the trial, and that the defendant had, on the testimony of one witness, whom he had suborned, recovered a verdict for too large damages, and that the supreme court had refused a new trial.

In the case of *Floyd v. Jayne*, 6 Johns. Ch. 481, Chancellor Kent again says: "Anciently courts of equity exercised a familiar jurisdiction over trials at law, and compelled successful parties to submit to a new trial or be perpetually enjoined from proceeding on his verdict. But this practice was long since gone out of use, and such a jurisdiction is rarely exercised in modern times, because courts of law are now in the competent and liberal exercise of the power of granting new trials."

In *Larabrie v. Brown*, 1 DeG. & J. 204, Lord Justice Turner remarked, that the bill then under consideration was like a bill for a new trial, and that such bills had been filed at former times, but he believed that no such attempt had been made for the last two or three hundred years.

The disuse of such bills results from the fact that, since the relaxation by the common law courts of the rules for the granting of new trials, scarcely any legal ground for a rehearing can now be asserted in the common law tribunals. As courts of law have extended their jurisdiction over this subject, courts of equity have in this instance withdrawn theirs, in accordance with the principle that, where a court of law can furnish an adequate remedy, equity will not interfere.

Now, on turning to the bill in the present cause, it appears that the grounds upon which this application is made are one of which the circuit court, by its well-established practice, could have taken cognizance. The right to set aside verdicts, for fraud, surprise, or newly-discovered evidence, is constantly and liberally exercised by our own common law tribunals. What, then, in the present instance, is the exceptional character of the case to take it out of the rule that equity will not interfere? The only ground that

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can be suggested is, that the evidence was discovered so late that the motion for a new trial could not have been made at the circuit court, because of the existence of a rule that motions for new trials must be made during the term of trial. Without discussing the force of this rule, whether it precludes the circuit from considering a motion for a new trial based upon the discovery of facts subsequent to the trial term, it is sufficient that the bill does not disclose when the facts here relied on for a new trial came to the knowledge of the defendant.

The bill states that the second action was tried at the September term of the Hudson circuit, in which trial Maxwell, having obtained further testimony in relation to the transactions between the father and son, was enabled to prove certain things, and so gained a verdict. The bill does not disclose when he obtained this information. It does not appear that it was discovered after the expiration of the trial term, but, on the other hand, the inference arising from the statements in the bill is, that it was discovered previous to the second trial. The bill should have clearly disclosed that the application was based upon a matter of which the circuit was powerless to take cognizance. This it fails to do, and in this respect the bill is demurrable.

The second verdict, of course, could not be used as evidence upon the retrial of the replevin suit. It was a verdict on an action between different parties, and could not be pleaded in bar or offered in evidence in the action between Maxwell and the sheriff.

There is another ground upon which I think the bill is defective. Nothing is shown of the nature of the evidence which is alleged to have been newly discovered. The rule as to the character of the newly-discovered evidence which can be successfully presented as a ground for a new trial, is well settled. It must be material, relevant and non-cumulative, and such as could not have been discovered in time for use at the first trial by the exercise of proper care and diligence. The bill should disclose the character of the evidence

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dence, so that, from the pleading, the court can determine its materiality and relevancy. The bill should further show that proper diligence was used in the preparation for the first trial, and that the exercise of such diligence failed to discover the testimony, or that, from the character of the testimony or the manner of its subsequent discovery, no proper degree of care would have brought it to light in time for the original trial. This the pleader fails to do. On these grounds, I think the bill is demurrable, and that the decree overruling the demurrer should be reversed, with costs.

Decree unanimously reversed.

JOHN McANDREW, appellant,

v.

PETER WALSH, respondent.

1. On a bill for an accounting, not alleging the existence of a partnership, but that the complainant is, by a verbal agreement with the defendant, entitled to one-half of the profits of a contract to build a tunnel, if the complainant fails to prove such verbal agreement, he cannot obtain relief in equity, on the ground that the evidence shows that he was to be paid out of the profits whatever his services were worth.

2. *Query*, Whether, if an agreement had been shown entitling the complainant to a share of the profits, not as a partner, but by way of compensation for services as employe, the bill would be good for an accounting in the first instance, without bringing an action at law to recover the stipulated moneys.

Mr. F. B. Colton and Mr. Hamilton Odell, for appellant.

Mr. John Linn, for respondent.

NOTE.—In this case no briefs were furnished to the reporter.—REP.

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On appeal from the following decree, advised by Barker Gummere, esq., a special master :

THE MASTER.

This cause coming on to be heard before Barker Gummere, esquire one of the masters of this court (to whom said cause was referred by the chancellor, to hear the same for the chancellor, and report thereon, and advise what order or decree should be made thereon), at the state house, in Trenton, on the 29th day of June, 1878; and the pleadings and proofs in the cause having been read, and the argument of counsel heard thereon, and the said master having taken time to consider the same, and the said master having made his report thereon to the chancellor, and having found, as matters of fact in said cause :

That the said complainant was not a partner with said defendant in the contract for making the Bergen tunnel, nor in the work done under said contract; and that the said complainant was employed by said defendant to assist him in and about the work done under said contract, and the performance thereof; and that said complainant rendered service to the said defendant, in said employment, in superintendence and otherwise, but that the length of such employment, and whether continuous or not, was not satisfactorily proven; and that said defendant was not proven to have agreed to pay to said complainant one-half of the profits arising from the performance of said contract, as compensation for such services or otherwise; and that there was no agreement between them for a specific compensation or rate of compensation, and that said complainant was to be paid a reasonable compensation for his said service, out of the profits arising from said contract, if a profit arose therefrom, and that, if there were no profits, he was not to be entitled to compensation; and that said complainant furnished a team (two horses and a wagon or wagons) to said defendant, for use in the performance of said contract and that said team was used therein, the length and extent

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of said use not being satisfactorily proven; and that said complainant advanced money to said defendant in and about the performance of said contract, and paid money for his use in and about the same, upon the understanding and agreement between them that such advances and payments should be repaid by said defendant to said complainant out of the moneys to be paid to said defendant upon the contract, but that there is no satisfactory evidence of the amount of such advances and payments, nor of the amount to which they have been repaid by said defendant; and that the said complainant, with the knowledge and assent of said defendant, advanced wages to the laborers employed by said defendant, and also sold goods to said laborers, upon an understanding and agreement between the said complainant and defendant that the amount of the wages so advanced, and the price of the goods so sold, should be reported to said defendant, and should be collected and retained monthly by said defendant, out of the wages due from said defendant to said laborers, and be paid monthly by said defendant to said complainant; and that said defendant did make monthly collections, and did make monthly payments, under said agreement, to said complainant, but that there is no evidence in the cause from which satisfactorily to determine whether any or what amount is due from said defendant to said complainant on account of the said agreement or the collections and payments thereunder; and that the said defendant rendered the said service of collection and payment to said complainant, at his request, and that the said defendant is entitled to a reasonable compensation therefor; and the said master being of opinion that the said complainant is entitled to be paid, out of the profits arising from the performance of the contract for the Bergen tunnel, such sum as shall be ascertained to be a reasonable compensation for his services rendered to said defendant in and about the performance of said contract; and that, as his right to compensation depends upon the fact whether profits have accrued under

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the contract, and, if profits have accrued, whether they are sufficient wherewith to pay him such compensation, or any balance thereof found due to him, said complainant is entitled to have an account taken of said profits, unless the said defendant will admit said profits to an amount equal to the compensation to which said complainant shall be found to be entitled; and that said complainant is entitled to be paid, out of the moneys due to said defendant upon said contract, all sums of money which he has advanced to said defendant, or has paid for his use in and about the performance of said contract, and which have not been repaid by said defendant; and that said complainant is entitled to be paid, out of the moneys last aforesaid, all moneys which the defendant has collected and retained from the wages of his laborers, or which he might, with reasonable diligence, have collected and retained for the use of said complainant, for wages by him advanced, and goods by him sold, to said laborers, and of which advances or sales said complainant had given previous notice to said defendant, and which the said defendant has not heretofore paid to the said complainant; and that said defendant is entitled to receive from said complainant a reasonable compensation for his services in making the aforesaid collections and retentions from the said laborers' wages, and paying over the same to said complainant; and that the amount of such compensation, when ascertained, will be a proper set-off against any amount found due to said complainant from said defendant, under the findings of fact or conclusions of law before stated; and that the evidence already taken in the cause, so far as it is material, should be used by either party, but that further testimony should be produced by both parties in support and disproof of the items of their respective claims; and that there should be a reference to a master, to take and state an account of the profits which have accrued to said defendant in the performance of the aforesaid Berger tunnel contract, unless the said defendant, before the taking of said account, shall deliver to the master his stipulation

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in writing, admitting, for the purposes of this suit, that said **p**rofits are equal to such amount as may be found to be **a** reasonable compensation to said complainant for his **s**ervices in and about the performance of said contract, by **s**uperintendence and otherwise, and also of the extent and **n**ature of the said services of said complainant to said **d**efendant in and about the performance of said contract, **a**nd during what periods the same were rendered, and what **w**ould be a reasonable compensation for such services, and, **a**lso, of the extent and nature of the use which was made **b**y said defendant of the horses and wagon or wagons of **s**aid complainant, and during what periods the same were **s**o used, and what would be a reasonable compensation for **s**uch use; and, also, of what moneys the said complainant **h**as advanced to, or paid for the use of, the said defendant, **i**n and about the performance of said contract, and which **h**ave not been heretofore repaid by the said defendant to **t**he said complainant, and, also of what moneys the said **d**efendant has collected and retained for the use of said **c**omplainant, for wages by him advanced and goods by him **s**old to said laborers, and of which advances and sales said **c**omplainant had given previous notice to said defendant, **a**nd which said defendant has not heretofore paid over to **s**aid complainant; and, also, what would be a reasonable **c**ompensation to be paid by the said complainant to the **s**aid defendant, for his services in collecting and retaining **f**rom the wages of his said laborers the said sums due from **t**hem to said complainant, and paying over the same to said **c**omplainant; and that, in taking said account, the master **s**hould set off the compensation found to be due to said **d**efendant for the said collection and payment, against any **s**ums found to be due from said defendant to said **c**omplainant, upon the taking of the account so as aforesaid **d**irected; and that the injunction heretofore issued in this **c**ause should be so far modified as to permit the Delaware, **L**ackawanna and Western Railroad Company to pay to said **d**efendant all moneys due from them to him on account of

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the making of said Bergen tunnel, save and except the sum of \$25,000, as to which sum the said injunction should be retained:

DECREE.

It is now, on this 6th day of November, 1878, by Theodore Runyon, esquire, chancellor of the state of New Jersey, ordered, adjudged and decreed, and the said chancellor doth, by virtue of the power and authority of this court, hereby order, adjudge and decree, that the said complainant is entitled to be paid, and that the said defendant do pay to him, out of the profits arising from the performance of the said contract for the Bergen tunnel, such sum as shall be a reasonable compensation for his services rendered to said defendant in and about the performance of said contract, and that the said complainant is entitled to have an account taken of such profits, unless the defendant will admit said profits to an amount equal to the compensation to which the said complainant shall be found to be entitled.

And it is further ordered, adjudged and decreed, that said complainant is entitled to be paid, and that said defendant do pay to him, out of the moneys due to said defendant upon said contract, all sums of money which he has advanced to said defendant, or has paid for his use in and about the performance of said contract, and which have not been repaid by said defendant.

And it is further ordered, adjudged and decreed, that the said complainant is entitled to be paid, and that said defendant do pay to him, out of the moneys due to said defendant upon said contract, all moneys which said defendant has collected and retained from the wages of his laborers, or which he might, with reasonable diligence, have collected and retained for the use of complainant for wages by him advanced, and goods by him sold to said laborers, and of which advances or sales said complainant had given notice

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of said defendant, and which the defendant has not heretofore paid over to said complainant.

And it is further ordered, adjudged and decreed, that the said defendant is entitled to receive from said complainant reasonable compensation for his services in making the foresaid collections and retentions from the said laborers' wages, and paying over the same to said complainant, and that such amount, when ascertained, shall be allowed as a set-off against any amount found due to said complainant from said defendant in the accounting to be had between them by virtue of this decree.

And it is further ordered, adjudged and decreed, that it be referred to Isaac Romaine, esq., one of the masters of this court, to take and state an account of, and that he report to this court, the profits which have accrued to said defendant in the performance of the aforesaid Bergen tunnel contract, unless the said defendant, before the taking of said account, shall deliver to said master his stipulation, in writing, admitting, for the purposes of this suit, that said profits are equal to such amount as may be found to be a reasonable compensation to said complainant for his services in and about the performance of said contract, by superintendence and otherwise, and also to ascertain and report to this court the extent and nature of the said services of said complainant to said defendant in and about the performance of said contract, and during what period the same were rendered, and what would be a reasonable compensation for such services, and also of the extent and nature of the use which was made by said defendant of the horses and wagon or wagons of said complainant, and during what period the same were so used, and what would be a reasonable compensation for such use, and also what moneys the said complainant has advanced or paid for the use of said defendant in and about the performance of said contract, and which have not heretofore been repaid by the said defendant to the said complainant, and also of what moneys the said defendant has collected or retained from the wages

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of his laborers, or might, with reasonable diligence, have collected and retained, for the use of said complainant, wages by him advanced, and goods by him sold, to said laborers, and of which advances and sales said Walsh has given previous notice to said defendant, and which said defendant has not heretofore paid over to said complainant and also what would be a reasonable compensation to be paid by the said complainant to said defendant, for his services in collecting and retaining from the wages of said laborers the said sums due from them to said complainant, and paying over the same to him; and, in taking account, the master is to set off the compensation found to be due to the said defendant for the said collection and payment, against any sums found to be due from said defendant to said complainant, upon the taking of the account hereunto directed; and, further, that the evidence already taken in this cause, so far as the same is material, may be used by either party before said master, and that both of said parties be at liberty to produce further evidence before the said master in support and disproof of the items of their respective claims, and that the said master is to make report with all convenient speed.

And it is further ordered, adjudged and decreed, that the injunction heretofore issued in this cause be so far modified and the same is, hereby, so far modified, as to permit the Delaware, Lackawanna & Western Railroad Company to pay to said defendant all moneys due from them to him on account of the making of said Bergen tunnel, save and except the sum of \$10,000, as to which amount the said injunction is retained.

And all further equity is reserved until the coming in of said master's report.

The opinion of the court was delivered by

Dodd, J.

John McAndrew, the defendant below, contracted, in 1873, with the Delaware and Lackawanna Railroad C

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pany, to construct a tunnel through Bergen Hill. The tunnel was completed about May, 1877. In the following July, Peter Walsh filed the bill in this suit for an accounting against McAndrew, and the recovery of an equal share with him in the profits of the work. The bill does not allege, in express terms, nor in necessary effect, the existence of a partnership between them, but sets forth a verbal agreement under which Walsh (who, at that time, was doing business in Scranton, where McAndrew also resided) was to become security on McAndrew's bond for the performance of the contract, to give up his business in Scranton, remove to Jersey City, assist in the prosecution of the work by his personal services and by advances of money, and, upon the completion of the job, to be repaid his advances, and, in addition, an equal share of the profits. The bill alleges that the complainant carried out this agreement on his part; that large profits resulted, and that the company (which is also a defendant) has not yet paid to McAndrew the balance remaining due. The relief prayed for includes an accounting and an injunction restraining, meanwhile, the payment of such balance.

The answer denies the making of any agreement whatever, by which Walsh was to be employed or was to share in the profits, and denies that he, in fact, rendered any services or made any advances of money, as stated in the bill. It says, in substance, that after Walsh had become surety for McAndrew, the latter represented to him that he could do a good business on the tunnel premises, by McAndrew's aid, in selling groceries and other articles to his workmen; that McAndrew permitted him to set up a store near the works, and agreed to use his influence among the workmen to induce them to deal at the store, and also agreed that the amount of the bills of the workmen should be sent to his office, to be deducted from the amounts due them respectively, on pay-days; that this arrangement was carried out; that Walsh gave his time and attention to the business of the store, and made from it

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large profits, down to about January, 1876, when he gave up the business and returned to Scranton.

A large volume of testimony was taken upon these issues of fact, and, a hearing having been had before an advisory master, a decree was made adjudging that the complainant was entitled to an account, and, if any profits should be found to have resulted, to be paid out of them, not the one-half part claimed by the bill, but such amount as, upon a reference, the services rendered by the complainant should be found to be reasonably worth. The moneys advanced by Walsh, and the moneys collected, or which ought to have been collected, by McAndrew, for complainant's use, for goods sold the laborers, were decreed to be repaid, irrespective of the profits, out of what might be due from the company on the contract, and also an injunction granted restraining in their hands \$10,000 of such moneys pending the suit.

In the judgment of the advisory master, the proofs did not admit the conclusion that there was an agreement of partnership, or an agreement for an equal, or for any specific, definite division of the profits, and the manifest correctness of this judgment was not disputed on the argument of the appeal. But the master inferred, from the evidence, an agreement between the parties that Walsh was to be employed to aid McAndrew in the work, and was to be paid, out of the profits, whatever his services were worth—if no profits, no compensation for services; but, in any event, a repayment of moneys advanced and of moneys collected or due from workmen, as stated above. There is, I think, a clear failure of proof to warrant the inference of any agreement or understanding between the parties for compensation out of the profits, and, for this reason, without reference to the question whether any agreement existed for the rendering of services, or whether services were, in fact, rendered, or moneys advanced by the complainant, there is no ground for equitable relief, and the decree must, consequently, fall.

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No review of the testimony of the numerous witnesses in the cause is deemed to be requisite. Whether, if an agreement had been shown entitling the complainant to a share of the profits, not as a partner, but by way of compensation for services as an employe, the bill would be good for an accounting in the first instance, without bringing an action at law to recover the stipulated moneys, is a question which was not discussed at the argument, and upon which no opinion is meant to be intimated. Reference was made to the cases of *Nutting v. Colt*, 3 Hal. Ch. 539, and *Hargrave v. Conroy*, 4 C. E. Gr. 281, but the rulings therein adopted on this point were not drawn under review in the argument here.

The decree must be reversed, and the bill dismissed, with costs.

Decree unanimously reversed.

JAMES J. BURNETT, assignee, and others, appellants,

v.

THE MAYOR AND ALDERMEN OF JERSEY CITY and others,
respondents.

A provision in a building contract that the contractor should not, without the written consent of the owner, assign any of the moneys payable thereunder, under penalty of forfeiture &c., is for the benefit and protection of the owner alone, against the dereliction or insolvency of the contractor, and if an installment of the moneys not yet due be assigned to materialmen, and notice thereof given to the owner without his exception, subsequent creditors of the contractor can derive no advantage therefrom.

Mr. J. Flemming, for appellants.

Mr. F. McGee, for respondents.

NOTE.—The brief of the respondents was not furnished to the reporter.—REP.

Burnett v. Jersey City.

On appeal from a decree advised by Hon. Amzi Dodd — a special master, whose opinion follows:

THE MASTER:

The decree in this case having been advised by me, and an appeal taken therefrom, I have been called on for an opinion. The case involves many details which do not seem to me at all important to be stated. A public school-house was contracted to be built for the complainants, by Dittmar, in Jersey City. The contract was dated December 11th, 1876, and was filed in the county clerk's office before any work done or materials furnished. Dittmar agreed to do all the work and furnish all the materials, and to complete the building according to the specifications, for \$31,125. He began the work a few days after the date of the contract, and finished it about November 1st, 1877. He became indebted, during the progress of the work, to the defendants, respectively, for materials, or else for work. On the 11th of June, 1877, or thereabouts, he was indebted to the firm of Dodge, Meigs & Co., in Jersey City, and also to the firm of Wightman & Brothers, in Newark, for materials furnished by both these firms and used in the building. By a written assignment of the date last named, Dittmar assigned to Dodge, Meigs & Co. the last payment or installment to be paid by the city under the contract, the amount being \$5,125. The whole of this sum was not owing from Dittmar to Dodge, Meigs & Co., and on the 13th of August, Dittmar, in order to secure Wightman & Brothers their claim, gave them an order on Dodge, Meigs & Co. for all of said last installment over and above \$2,500. This order was on the same day accepted by Dodge, Meigs & Co., payable by them when they should obtain the warrant. The whole of the last installment was not more than enough to pay the debts due to these two firms. Afterwards, several other creditors of Dittmar, who had done work or furnished materials in the building, put in their claims (or, perhaps I should say, allege that they did), by giving notice to the city,

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er the third section of the mechanic's lien law, of the
s due them respectively, and of his refusal to pay. The
filed the present bill of interpleader and paid the fund
court. The first question controverted before me, was
question between the two firms named above on the one
who claimed the whole fund under the assignment,
the other defendants on the other side, who claimed
r their notices to the city. Inasmuch as I held that
assignees were entitled to take the fund as against the
r defendants who relied on their notices, it did not
me necessary to decide the disputed questions raised, as
een the defendants themselves, who compose the
nd class of claimants. I advised that, as to the fund
ble under the written contract, the same should be
ed to go to the assignees, and that, as to the amount of
, which was due from the city for some extra work
to the school-house outside of the written contract,
ame should be decreed to go to those who had done
extra work or furnished the materials for it. There
no dispute about the appropriation of the last-named
and I do not understand that any dispute about it will
under the appeal. The questions between the defend-
of the second class, that is, those who relied on their
es, related mainly to the legality of the different
as in which the several notices were served. They
not be adverted to.

ie contract between the city and Dittmar provided that
contractor should not assign, by power of attorney or
rwise, any of the moneys payable under the agreement,
as by the consent of the board of public works, to be
fied by endorsement thereon; and that, if the contract
ld be assigned otherwise than therein specified, the
board should have the power to notify the contractor
iscontinue all work under the contract, and take the
s into their own hands. It is out of this feature, or
ision, of the contract, that the present controversy
fly arises. It was contended, on behalf of the defend-

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ants, relying on their statutory notices, that this provision of the contract against assigning any of the moneys, was one for their benefit; that being in the contract as filed they had a right to rely on it, and because it is not asserted that any consent was endorsed or given by the board of public works, it results that the assignment to Dodge, Meigs & Co. was unwarranted, and of no effect as against such defendants. This contention does not seem to me to be one that can prevail. I think that the provision applied only to the city, and can be set up only by the city. The city had the right, if it chose so to do, to insist on the consequences mentioned in the contract—that is, to take the work out of Dittmar's hands, but it saw no reason to do this, and did not object, although it is shown by the proof that the city clerk was notified that the transfer had been made, immediately after it was made. There is nothing whatever in the case to suggest any unfairness or defect in equitable rights on the part of the assignees. On the contrary, they gave full consideration for the debts due them from Dittmar, as full as that given by any of the other defendants. Their claims are in themselves as meritorious as the claims of the other defendants. Aside from the alleged prohibitory feature of the contract, it is not contended that Dittmar had not the legal right to assign. In the view which I have taken of the case, it is disposed of by what I have thus briefly said.

Mr. J. Flemming, for appellants.

I. The assignment to Dodge, Meigs & Co. was void as against the claimants under the notices under the lien law, who furnished material and did work in erecting the school building; because, in the contract between Dittmar and the mayor and aldermen of Jersey City, it was provided, "that Dittmar should not assign, by power of attorney or otherwise, any of the money payable under said agreement unless by and with consent of board of public works, to

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signified by endorsements on the agreement." No consent to said assignment to Dodge, Meigs & Co. was given, and no consent thereto was endorsed on the contract, and no notice of said assignment was given until after the said claimants had done work and furnished material in erecting said school-house.

(a) No assignment could be made to Dodge, Meigs & Co. without consent of the board of public works. This was necessary, and such consent must be proved by Dodge, Meigs & Co, before an assignment could be valid as against these creditors.

(b) This provision is not a restraint on alienation, but is analogous to a provision in a lease prohibiting assignment without the written consent of the landlord. These and similar provisions are upheld. *Taylor's Landlord and Tenant* § 402.

(c) It is against policy to legalize this assignment. The school was for the public. No lien could attach to this building and land. A secret assignment would make the people a party to a possible fraud, and prevent the party working for the city from getting credit. So, the work would cost more, and the public be injured. *Story Eq. Jur.* 1040.

An assignment of contract in express violation of its terms, is void. *Grigg v. Landis*, 4 C. E. Gr. 350.

In some cases courts of equity will give effect to a collateral covenant, by refusing to decree a specific performance of the principal contract in favor of the party who has obtained his interest in violation of a collateral covenant restraining assignment. *Grigg v. Landis*, 6 C. E. Gr. 510.

Here are reasons why the court should not give effect to this assignment:

(1) It is in violation of the covenant not to assign without consent.

(2) It is in violation of the provision that consent should be endorsed.

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(3). It is in violation of the spirit of the lien law, that the parties may look to funds in the hands of the owner for payment.

(4) It makes the fraud possible. An owner may make a contract in writing, and file it in the county clerk's office. That frees the land from lien. The builder may then assign payments, and that clears the fund in the owner's hand from claims under third section, by parties furnishing material or doing work.

These and other reasons bring this case within the ruling of the chancellor in *Grigg v. Landis*, and furnish the exception to the rule on which the court reversed.

One design of requiring the contract to be filed, is to apprise mechanics and others to what extent the building is exempt from lien, and how far they must look to the builder alone for payment. *Ayres v. Revere*, 1 Dutch. 474, 475; *Mechanics Loan Ass'n v. Albertson*, 8 C. E. Gr. 319.

II. The assignment to Dodge, Meigs & Co., was for money to come due in the future, for the work and material of these claimants, and is void as against these claimants, furnishing material and doing work without notice of it.

III. At the time of the alleged assignment to Dodge, Meigs & Co., there was no money due to them for material furnished on school-house.

IV. There never became due to Dodge, Meigs & Co. the sum of \$5,125, and the assignment to them was not for the whole of the money to become due from Dittmar, but on a part (\$2,500).

Serving notice for more than is due, is fatal to the claim. *Reeve v. Elmendorf*, 9 Vr. 132.

An order which only carries a part of a fund, does not amount to an assignment of that part, or give a lien against the drawee, unless he consent to the appropriation by acceptances of the draft. *Mandeville v. Welch*, 5 Wheat. 277; *Tie-man v. Jackson*, 5 Pet. 580; *Hopkins v. Beebe*, 2 Casey 35; *Adams v. Claxton*, 6 Ves. 231.

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V. The assignment to Dodge, Meigs & Co. was on a secret understanding that they were to retain for Dittmar 500, and ought not to be enforced against these appellants and the lien claim creditors.

VI. The assignment to Dodge, Meigs & Co. was only of part of the last payment to become due to Dittmar, and, enforced, should be confined to that.

VII. But the assignment of the contract, or any payment thereunder, by Dittmar to Dodge, Meigs & Co., was fraudulent, and calculated to hinder, delay and defraud creditors.

a) The evidence shows "*badges of fraud*," which should include a recovery by both Dodge, Meigs & Co., and their assignee, Wightman & Brothers.

b) As to secrecy and concealment, see *Bump on Fraud*. Survey. pp. 81, 84, 86; *Cummins v. Little*, 1 C. E. Gr. 48; *Trlatt v. Warwick*, 3 C. E. Gr. 108; *Hodgson v. Farrel*, 2 Cart. 88; *Wintermute v. Snyder*, 2 Gr. Ch. 490; *Scott v. Hartman*, 11 C. E. Gr. 89.

VIII. Dodge, Meigs & Co. and Wightman & Brothers are chargeable with notice of fraud.

a) Although a purchaser of property transferred by a debtor to defraud his creditors, pay full consideration and have no notice that the property is transferred to him for that purpose, yet if, from the circumstances, he must have inferred that such was the object, the sale will be set aside as against a creditor. *Green v. Tantom*, 4 C. E. Gr. 105.

(b) If a purchaser has before him facts which should put him on inquiry, it is equivalent to notice of the fact in question, and where such fact constitutes a fraud on a third party, it will not protect the purchaser that he purchased for value. *Green v. Tantom*, 6 C. E. Gr. 364.

(c) *De Witt v. Van Sickle*, 2 Stew. 209, held, that "A person who willfully closes his eyes to avoid seeing what he believes he would see if he kept them open, must be con-

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sidered to have seen what any man with his eyes open would have seen."

IX. This assignment to Dodge, Meigs & Co., if not fraudulent in its entirety, is fraudulent as to the excess over the interest of Dodge, Meigs & Co., if anything. *Bump v. Fraud. Convey.* p. 303; *Morris Canal & Bank'g Co. v. Stearns*, 8 C. E. Gr. 414, 427, 9 C. E. Gr. 588; *Jones v. Adams*, 8 C. E. Gr. 113; *Demarest v. Terhune*, 3 C. E. Gr. 5; *Coley v. Coley*, 1 McCart. 350.

X. The order given by Dittmar on Dodge, Meigs & Co. in favor of Wightman, for the excess over \$2,500, is nothing to operate upon. Dodge, Meigs & Co. did not have the money, were not entitled to receive it, and their acceptance of the order was only conditional.

(a) Wightman could acquire no equitable lien upon the fund in the city's keeping until the city had been duly notified of the assignment and had accepted it, so as to complete the privity of contract and the appropriation of the money. *Piernan v. Jackson*, 5 Pet. 580; *Williams v. Evans*, 14 East 582; *Grant v. Austin*, 3 Price 58.

XI. The assignment of a chose in action is not complete until notice is given to the debtor; and until such notice the property remains in the assignor, and is liable for the debts. *Woodbridge v. Perkins*, 3 Day 364; *Judah v. Jones*, 5 Day 534; *Vanbuskirk v. Ins. Co.*, 14 Conn. 141; *Wood v. Partridge*, 11 Mass. 491; *Loomis v. Loomis*, 25 Vt. 198; *Richards v. Griggs*, 16 Mo. 416; *Blin v. Price*, 20 Vt. 25; *Barber v. Porter*, 44 Vt. 587; 2 Story's Eq. Jur. 376 § 1048; 1 Story's Eq. Jur. 387 § 1057.

XII. This court ought not to permit Dodge, Meigs & Co. and Wightman & Brothers to be paid, because the money paid them on their assignments came out of the material and labor of these appellants, furnished in the erection of said school building, and the concealment or want of notice of such assignments by said Dodge, Meigs and Co. and Wightman Brothers was a fraud on these appellants, w

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furnished material and did work on the strength of the presumed liability of the city to pay these claimants the amount due them on notice under the lien law.

XIII. The foregoing points raise the objections to decree in favor of Dodge, Meigs & Co. and Wightman Brothers, under the assignments. We claim that neither Dodge, Meigs & Co. nor Wightman Brothers are entitled to a decree for anything as claimants under the third section of mechanics lien act; neither of them served notices under said act.

(a) Dodge served the assignment on city clerk, October 9th.

(b) This is not a notice under the lien law; on the contrary, it claims against it.

(c) Wightman Brothers served no notice under lien law; they claim only under Dodge, Meigs & Co.

XIV. Cornelius Zabriskie claims under an assignment of extra work, and the same objections apply to his claim as to those of Dodge, Meigs & Co. and Wightmans.

XV. Meyer & Martin are entitled to no preference over the other claimants under the lien law, and their notice was served after that of appellants.

XVI. Notice under third section of the lien law operates as an assignment of the debt due the contractor, under contract. *Wightman v. Brenner*, 11 C. E. Gr. 489.

Act to secure to mechanics and others payment for their labor and materials in erecting any building. *Rev. 668, §§ 1-4, et seq.*

The claimants who served notices under the lien law are entitled to be paid, out of the money in court, the several sums due to them.

(1) In the order in which the notices were served.

(2) Or, *pro rata*, as to amount of claim, and sum out of which it is to be paid.

(a) The first is in accordance with the decisions.

(b) The second follows the spirit of the lien law.

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XVII. To the contract forbidding the assignment of moneys due on the contract without the consent of the board of works, the same rule must be applied in equity as in law, or equity must follow the law, and the assignments to Dodge, Meigs & Co., and Wightman Bros., are void, because no consent or acceptance of the board of works was given to such assignment. *Crocker v. Whitney*, 10 Mass. 316; *Mowry v. Todd*, 12 Mass. 281; *Barrett v. Union Ins. Co.*, 7 Cush. 175; *Tibbetts v. George*, 5 Ad. & E. 115; *Stiles v. Farrar*, 18 Vt. 444; *Smith v. Berry*, 18 Me. 122; *Manderille v. Welch*, 5 Wheat. 277.

The opinion of the court was delivered by

GREEN, J.

The parties contestant in this cause were defendants, in the court below, to a bill of interpleader, filed by the mayor and aldermen of Jersey City, for the purpose of settling and adjusting the respective claims of the parties to the money due from the complainants to Adam J. Dittmar, for the erection of a public school-house in Jersey City. The building was erected under a written contract, duly filed in the county clerk's office before the commencement of the work, and was finished by the contractor according to the specifications, and accepted by the board of public works of the city. At the time of its completion, there remained due from the city the sum of \$5,125, being the last payment under the contract, and the further sum of \$425 for extra work and materials used in the erection of a stoop, ordered by the city and not included in the agreement.

During the progress of the work, Dittmar became indebted to various parties, for labor performed and materials furnished for the erection of the building, and, on June 11th, 1877, he assigned to Dodge, Meigs & Co. all his right, title and interest in the last payment to become due to him by virtue of the contract, notice of which assign-

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ment was acknowledged by the city clerk on August 4th, 1877. The purpose of the above assignment was to secure to Dodge, Meigs & Co. the payment of \$2,500 for materials furnished, and to be furnished, by them to Dittmar. On August 13th, Dittmar, in order to secure to Wightman & Brothers their claim for labor and materials, drew an order in their favor on Dodge, Meigs & Co., for the balance of the said last payment over and above \$2,500, which order was accepted on the same day by Dodge, Meigs & Co., payable when the warrant for \$5,125 was obtained by them. On September 1st following, Dittmar transferred to Cornelius Zabriskie the warrant for the money due from the city for the extra work. Subsequent to these assignments, several creditors of Dittmar, who had furnished labor and materials for the school building, served notices on the city authorities for the amount of their respective claims, pursuant to the third section of the mechanics lien law (*Rev. p. 668*). The money was paid into court by the complainants on filing their bill of interpleader, and the cause, when at issue, was referred to one of the advisory masters of the court to hear and determine.

It was not disputed, on the hearing before the master, nor in this court, but that the bill of interpleader was properly filed, and that the complainants are entitled to their costs out of the fund. The real controversy is between the creditors who attempted to secure their claims by demand and notice under the lien law, on one side, and the firms of Dodge, Meigs & Co. and Wightman & Brothers, who claim under the assignments from Dittmar, on the other.

The assignments being all prior in point of time to the giving of the notices under the lien law, the fund, after payment of the complainants' costs, was adjudged, in the court of chancery, to the assignees of Dittmar, according to their respective priorities. The decision of the master is in accordance with well-settled and repeated adjudications in the courts of this state, and with the decision of this court in *Craig v. Smith*, 8 Vr. 549. From this decree the appel-

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lants bring their appeal, and contend that they should paid the amount due them on their notices under the lien law, in preference to the respondents. They insist that the assignments of the fund by Dittmar were void as against them, upon two grounds: First—Because they are in violation of the contract between Dittmar and the city. Second—Because they are fraudulent and against the policy of the lien law.

The contract for the erection of the building contained provision that the contractor should not, by power of attorney or otherwise, assign any of the moneys payable under the agreement, unless by and with the assent of the board of public works, to be signified by endorsement upon the agreement, and that, if the contract should be assigned otherwise than as therein specified, the board should have the power to notify the contractor to discontinue all work under the contract, and also power to complete the work themselves, at the contractor's expense, the cost to be deducted out of the moneys due or to become due to him under the agreement. It is alleged that the express consent of the board of works was not given or endorsed on the agreement pursuant to its provisions, but, if true, the omission cannot avail the appellants or avoid the claims of the respondents under the assignment. The covenant and the penalty for its violation were evidently designed for the protection of the city against the dereliction or insolvency of the contractor. The appellants had no interest in it, no right to demand its fulfillment, and were entitled to indemnity for its violation.

The assignment was not void, even as against the contractor, but voidable *pro tanto* only. The board of works could deprive the assignees of their rights under it. If deemed proper, they could protect the interests of the city by taking charge of the work and appropriating the money in hand to its completion. In such case, the surplus, if any, after deducting the money so expended, was expressly payable to Dittmar, and would pass to his assignees. But

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city had a clear right to waive the enforcement of a provision in the contract inserted for its special benefit, and did so, by omitting to give the required notice to the contractor, and permitting him to continue the work, as well as by bringing the fund into court and consenting to its distribution.

The second ground relied upon by the appellants is equally untenable. No actual fraud is alleged or attempted to be proved in the case. The claims of both parties are equally just and meritorious. No unfair advantage was taken by the respondents. Dittmar was largely in their debt. He wanted further credit for a large amount of lumber to finish the school building, and proposed to assign the last payment on the contract as security for both the new, and part of the old, indebtedness. They had the right to require security for the payment of their claims, and, as diligent creditors, they exercised the right. There was nothing in the case to preclude Dittmar's undoubted right to prefer any just creditors, and to secure their claims by assignment. Neither the giving nor obtaining of an honest preference allowed by law, can be evidence of fraud or of an attempt to hinder, delay and defraud creditors.

The allegation of undue concealment of the assignment by Dodge, Meigs & Co., to the prejudice of the appellants, is not sustained by the proofs. Notice of the assignment was given to the city clerk prior to August 4th, 1877, and Norman Dodge testifies that it was mentioned to several persons; that they made no secret of it, and did not attempt to conceal it. The further objections (that the assignment was made to secure future advances; that an assignment of part only of a fund gives no interest in the fund without the assent of the debtor, and that the assignment is contrary to the spirit and policy of the lien law), cannot prevail. A mortgage or assignment to secure future advances is held to be good in equity, and in this case the lumber was delivered at once, before the rights of the appellants intervened. The two latter objections are disposed of by the reasoning

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of the court in *Superintendent of Public Schools v. Heath McCart*. 23. See, also, *Phillips on Mechanics Lien* § 256.

It is further contended, that the assignment of a chose action is not complete until notice is given to the debtor and that, as no notice of the order in favor of Wightman Brothers was given to the city, that firm acquired no equitable lien upon the fund in the city's hands. But the order in favor of the Wightmans was drawn, not on the city, but on Dodge, Meigs & Co., to whom the assignment of the whole debt was made, and who were entitled, at law, to receive and receipt for the whole amount. Upon the acceptance of the order by the last-named firm, they became trustees for the Wightmans, to the extent of their interest. On the 20th of September, after the acceptance of the order, and before other claims intervened, a second notice of the assignment to Dodge, Meigs & Co. was filed with the city clerk. This clearly inured to the benefit of Wightman & Brothers, and perfected their equitable lien upon the fund. A notice from the Wightmans to the city could have been of no practical benefit. Both the debtor and creditors of Dittmar were apprised that he had parted with all his interest in the fund and that the assignees were entitled to receive the money.

It is urged, as a last ground for reversing this decree, that it directs that the money due under the contract, and that due for extra work, should be treated as distinct funds and be separately disbursed. In principle, there is no distinction between the funds; none is made by the lien law, and, ordinarily, the whole should be treated as one fund and be disbursed among all the claimants, according to the provisions of the law. But the decree expressly states that the two funds should, for the purposes of *this case*, be treated as distinct sums, and be separately disbursed. This decision and decree are confined to the case in hand, and are clearly right. The two funds were separately assigned by Dittmar, at different times, to different parties, and to secure different claims. To blend them again would be manifestly erroneous. The decree in favor of Zabriskie

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whom the assignment was made, and whose claim absorbed the larger part of the fund, cannot be questioned. The balance (about \$100) was directed to be paid to Mayer & Martin, on account of their bill for extra work. The master states that the appropriation of the money due for extra work was not disputed by any of the parties at the trial, and may be considered as made by consent. The decree should be affirmed, with costs.

Decree unanimously affirmed.

NAUM S. LUND, appellant,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, respondent.

A purchaser at a public sale of lands, contrived and carried out in order to defraud the creditors of the owner, is bound by the fraudulent acts of those who represented him in the transaction, although he was not personally present, and swears that he was ignorant as to the conduct of the sale.

On appeal from a decree of the chancellor, entered by advice of Hon. Amzi Dodd, as special master, whose opinion follows:

THE MASTER.

The mortgage sought to be foreclosed in this suit was executed and delivered to the complainants by Oscar F. Lund and wife, in October, 1870, to secure the payment, with interest, of the sum of \$8,000, loaned to them by the complainants. The mortgaged premises are in Jersey City. A decree *pro confesso* has been taken against all the defendants except Naum S. Lund, the father of the mortgagor. He has filed an answer, setting up that he holds the prem-

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ises free and clear of the mortgage, by virtue of a deed of conveyance to him made by the sheriff of Hudson county on the 21st day of December, 1871, about a year and a quarter after the delivery and recording of the mortgage. The deed of conveyance by the sheriff was made under an execution on a mechanics lien judgment entered in the Hudson circuit, September 1st, 1871, for the sum of \$193.75, beside costs. The lien claim was filed in June, 1872. The lien itself attached prior to the giving of the mortgage.

The question in this case is the single one, whether the deed from the sheriff is valid against the complainants. I am of opinion that it is not. I think that the sale under which the deed was given was a fraudulent scheme for getting control of the mortgaged premises, without the knowledge of the complainants and the other creditors, and to their prejudice. The defendant, Naum S. Lund, to whom the deed was given, resided in Boston, and seems to have furnished the money bid at the sale, which was the sum \$280. In his testimony he disclaims all knowledge of the damaging facts involved in the sale, and it may be that he was innocent of such knowledge, though the circumstances are strongly suggestive of the contrary belief. But if he had no actual and positive knowledge, he is affected by the knowledge of those who acted for him, and cannot profit by their unconscionable acts.

Oscar F. Lund, after having procured delays from time to time, in the collection of the lien debt and judgment, made an arrangement with the plaintiffs to assign the judgment to Charles E. Bigelow, who, it is plain from the evidence, took it solely for the benefit of Oscar F. Lund. The assignment to him was on the 13th of December, 1871, and on the 21st of the same month, Oscar F. Lund and Charles E. Bigelow caused the premises to be struck off to Naum S. Lund, who was not present at the sale, and who swears that he knew nothing about it at the time, and accepted implicitly what was done for him. The evidence shows, I think, with unmistakable clearness, that the whole

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arrangement was concerted and carried out so as to bring about a sale at a merely nominal sum (the premises being worth from \$12,000 to \$20,000) without the knowledge of the complainants, and without competition from other bidders. The attempt to defeat the complainants' mortgage by setting up this conveyance cannot prevail.

I will advise a decree in favor of the complainants, with costs.

Mr. G. Collins and Mr. B. Williamson, for appellant.

I. The normal effect of a mechanics lien judgment and sale, such as those under which the appellant claims, would be to cut out the respondent's mortgage. Such is substantially the decision in the case in this court of *Jacobus v. Mut. Ben. Life Ins. Co.*, 12 C. E. Gr. 604.

II. There is nothing in this case to except it from the normal rule. The undisputed (or at least uncontradicted) facts are :

(1) Oscar F. Lund bought land, took title in his own name, and built a house thereon—all with Joseph Palmer's money.

(2) Oscar F. Lund, having misappropriated a part of Palmer's money, borrowed from the respondent \$8,000, giving his bond, secured by the mortgage of himself and wife on said property.

(3) Between the application for the loan and the giving of the mortgage, Oscar F. Lund had conveyed the property to Palmer, to whom, in equity, it belonged ; but the deed had not been recorded, and, lest the loan might fail, he concealed the fact of such conveyance, and, with his wife, executed the mortgage.

(4) The deed to Palmer was afterwards recorded.

(5) Leonard & Son filed their lien claim against Oscar F. Lund (builder) and Palmer (owner), and proceeded to judgment, and advertised the property for sale. There is no pretence of any fraud or collusion in which they participated,

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or of which they had knowledge. They were simply enforcing their legal rights.

(6) Neither Oscar F. Lund nor Joseph Palmer had a money, and neither of them could have stopped the sale. Oscar F. Lund had no interest in the matter, except that he was personally liable on the judgment and on respondent's bond and mortgage (though, as to the latter, he did not know that it would be affected by the sale).

(7) Desiring to save the property for Palmer, because he had contracted Leonard's debt, and had had enough money from Palmer to pay it, Oscar F. Lund induced Bigelow to buy the judgment and hold it a few days, during which time he expected to get money to pay it.

(8) Oscar F. Lund failed to get the money, and Bigelow refused to wait longer, and caused the sheriff to sell. Learning from Oscar F. Lund that the appellant would, doubtless be willing to buy, Bigelow bid it in for him, and the appellant, as soon as he was informed of it, ratified the purchase and sent on the money for the deed.

It is said that Oscar F. Lund was either *cestui que trust* or agent of the appellant, and that his knowledge binds the latter, but we cannot see why Oscar F. Lund himself, with the knowledge he had in the premises, could not legally have bought on his own account, except for the fact that he was bound to pay Leonard & Son's debt, and so his purchase might have been held to be a payment; but why he could not act as another's agent, we fail to discern. His inability to buy, if it existed, did not depend on his knowledge, but on his relation to the parties. It can hardly be claimed that knowledge by the appellant of the facts which, it is claimed, Oscar F. Lund knew, would have precluded him from attending the sale in person, and buying the property. It is absurd to say that, because his age would not have allowed him to buy as a principal (if, indeed, he could not), therefore he who could have so bought must be deprived of the benefit of his purchase. If, indeed, the purchase by the appellant was in trust for Oscar F. Lund

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there is a show of right in the respondent's case, but it is the sheerest assumption that such was the fact. Oscar F. Lund had not a dollar in the world, and could not have saved the property from sale by any possibility. The proof is positive and unchallenged that appellant bought with his own money and for his own use. Had he refused to ratify the purchase, there would have been a new sale.

Granting that appellant so bought, there cannot be any question of fraud or collusion in the case. It would be impossible in the nature of things.

No one owed the respondent a legal duty to give it information of the proposed sale.

The "commencement of the building," before their mortgage was given, was legal notice to them of all that has occurred. They have suffered through the rigor of the law and their own negligence.

It is at the position and rights of Leonard & Son (the lien judgment creditors) the court must look; and to that position and to those rights the purchaser has succeeded. *Basset v. Nosworthy*, 2 W. & T. Lead. Cas. in Eq. (4th Am. ed.) 32, 33; *Le Neve v. Le Neve*, Id. 224-5.

The respondent's own case, however, shows that there was no fraud or collusion. Oscar F. Lund's course, after he discovered that the respondent's mortgage was cut off, proves it. He strove earnestly to induce the appellant to revive the respondent's mortgage. The appellant decided to take the judgment of the law upon his duty. (*Case p. 36.*) Surely the court, which is only asked to declare the law, cannot blame him for that. What he may hereafter do of grace, is for his own conscience.

III. Respondent's counsel raised, below, some question as to the effect of the lien, assuming that the title to property was in Oscar F. Lund and wife, as joint tenants, when the building was erected. It was claimed that there could not be a lien on a married woman's land for her husband's debt, and, Oscar F. Lund being now dead, that the lien was gone. There was no proof on the subject of title; all that is

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claimed as proof is the recital in the mortgage, and the extrajudicial affidavit annexed to it, by Oscar F. Lund and wife, that their title was perfect &c.; but this is not proven and the appellant insists, before this court, that the title was in Oscar F. Lund alone. If even the title was in him and wife, the court cannot assume that they were joint tenants, or seized of that peculiar estate of husband and wife in land *per tout et per my*, for not every tenancy of husband and wife is such. It depends upon the time, kind and number of conveyances by which the estate is created, and the court, in the absence of proof on those points, will assume a tenancy in common, which, at worst, gives appellant half the property. There was no issue of title in the pleadings, and the point is a surprise to us, and should not be considered. We submit, also, that the judgment in the lien suit directly involved the question of title, and concludes the respondent. The point, however, is of no weight, because of the statute passed a few months before this building was begun (*Rev. p. 669 § 9*), which gives a lien on a married woman's land, unless she files a dissent to the erection of the building.

The master seems to have considered this point unworthy of notice.

Mr. J. Vanatta, of counsel with respondent.

I. The title, if any, made by lien claim, has expired. The work and materials, for which the lien claim was filed, were furnished in July and August, 1870.

The alleged lien, if it attached to the property, did so before September 1st, 1870. It would be held to relate back to the commencement of the building, which, the answer avers, was in May, 1870.

Then, upon whose estate was the lien? Clearly only that of Oscar F. Lund; no claim of lien is made against the wife of Oscar F. Lund or her estate. The wife's estate could not be bound or affected by a building erected

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her husband. *Johnson v. Parker*, 3 *Dutch*. 239 ; *Nix. Dig.* 572 § 4 ; *Id.* 582 § 70 ; *McIntosh v. Johnston*, 10 *C. E. Gr.* 242.

The wife was not seized of a moiety, but of the whole, subject to having her whole estate defeated if she died before her husband. 4 *Kent Com.* 362 ; *Doe v. Parrott*, 4 *T. R.* 652.

The sole deed of the husband, made during the life-time of the wife, would have been void. *Bell on Law of Property* 396 ; *Green v. King*, 2 *W. Black.* 1211 ; *Black v. Anderson*, 2 *Vern.* 120 ; *Roper on Husband and Wife* 51.

It has been held, in favor of creditors, that a lien claim or judgment against, or mortgage by, the husband alone, will take such rights in the property as the husband has ; but, if the wife survives him, those rights all entirely end, and cease at his death. *Washburn v. Burns*, 5 *Vr.* 18 ; *Den v. Gardner*, *Spen.* 556.

Now, then, it is clear that the utmost that the purchaser under the lien claim could take was such estate as Oscar F. Lund had when the lien attached. Then, when Oscar F. Lund died, all the estate he ever had had in that land instantly ceased, because his wife survived him. See order of September 28th, 1875, in this cause. That order shows that Oscar F. Lund had died, and that his wife survived him.

If the sheriff's deed, made in pursuance of the judgment on the lien claim, conveyed any estate, the estate, whatever it was, ceased when Oscar F. Lund died. That ends the defence.

II. Naum S. Lund was trustee of and for Oscar F. Lund, or else the latter was agent for his father. In either phase the title of the father is affected by the fraud of the son.

As to the trust :

(1) The relationship of the parties, and the manner in which the father's pretended purchase was made, repel the idea and exclude the belief that the purchase was adverse to the ---

Wells v. Partridge.

(2) Oscar F. Lund talked and acted as the *cestui que tra-*
As to the fraud:

Palmer was not produced as a witness, nor was Ho-
land, nor the letters about the premises.

It is clear that, if the son was not the principal, he w-
the active agent of his father in the purchase of this pr-
erty; the father, therefore, is in no better position than t-
son. *Dunlap's Paley on Agency* 324; *Le Nere v. Le Ne*
2 Lead. Cas. in Eq. 23.

On primary and fundamental principles, as against t-
complainant, the sheriff's sale and conveyance to Naum
Lund was and is void, because the complainant had
notice of the lien claim or of the suit thereon, nor of t-
sheriff's sale.

Under such circumstances, to direct and destroy the co-
plainant's rights in the land, is contrary as well to natu-
as judicial justice. *State v. Mayor of Jersey City*, 4 Zab. 66
Freeholders of Hudson v. State, 4 Zab. 718; *Van Tilburgh*
Shann, Id. 740.

The only defence to the complainant's bond and mo-
gage, and the relief prayed for is, therefore, illegal, unju-
inequitable and insufficient, and the complainant shou-
have a decree pursuant to the prayer of the bill.

PER CURIAM.

This decree unanimously affirmed.

EDWIN F. WELLS and wife, appellants,

v.

CHARLES PARTRIDGE, respondent.

On appeal from a decree of the vice-chancellor, wh-
opinion is reported in *Partridge v. Wells*, 3 Stew. 176.

Wells v. Partridge.

Mr. A. V. Schenck, for appellants.

I. The complainant had his remedy at law. He could, at any time after the alleged account stated (on the 1st day of January, 1870), have brought his action at law for the recovery of the alleged balance of \$17,000. That action was barred by the statute of limitations at the time of the filing of the complainant's bill in this cause (January 24th, 1877).

This defence is available by demurrer to the bill. 1 *Dan. Ch. Pr.* 559, 560, and note; *Story Eq. Pl.* §§ 484, 751; *Bird v. Inslee*, 8 *C. E. Gr.* 363.

II. The complainant is in laches. A court of equity will not give him relief under such circumstances, and particularly where his action at law is barred by the statute of limitations. "*Vigilantibus, non dormientibus, æquitas subvenit.*" 2 *Story Eq. Jur.* §§ 1520, 1520(a), 1521(a), 1284(a), 1 *Id.* § 529; *Conover v. Conover*, *Sax.* 403; *Wanmaker v. Van Buskirk*, *Sax.* 685; *Cook v. Williams*, 1 *Gr. Ch.* 209; *Obert v. Obert*, 1 *Beas.* 423; *McClane v. Shepherd*, 6 *C. E. Gr.* 76; *Ruckman v. Decker*, 8 *C. E. Gr.* 289; *Elmendorf v. Taylor*, 10 *Wheat.* 152; *Miller v. McIntyre*, 6 *Pet.* 61; *Taylor v. Benham*, 5 *How.* 233; *Bowman v. Wathen*, 1 *How.* 189.

III. There is no express trust alleged in the bill. It is simply a case where all the authorities concur in holding that lapse of time, or the statute of limitations, will be a perfect defence.

IV. "Nor can mere inability to sue at law * * * alter the character of the trust, or the right of the defendant to avail himself of the statute of limitations as a defence." *Marsh v. Oliver*, 1 *McCart.* 259, *Green C.*, p. 263.

The statute of limitations is a bar in equity to an account between partners. *Cowart v. Perrine*, 3 *C. E. Gr.* 454.

The complainant seeks now to effect, indirectly, by the aid of a court of equity, what he could not accomplish at law—the recovery of the alleged balance found due on the accounting.

Wells v. Partridge.

V. The bill is defective, in that material statements therein are vague, uncertain and contradictory. *1 Dan. Ch. Pr. 368, 369.*

VI. The bill is *multifarious*, in that it mingles and confounds the copartnership matters, business and accounts of the firm of Partridge, Wells & Co., and of the firm of Partridge & Wells and of the complainant; thus uniting several matters, perfectly distinct and unconnected, against the same defendant. *Emans v. Emans, 1 McCart. 114; Emans v. Emans & Wortman, 2 Beas. 205; Van Mater v. Sickles, adm'r, 1 Stock. 483; Story Eq. Pl. §§ 271, 279; 1 Dan. Ch. Pr. 339, et seq.*

Thus, a bill praying for an account of two distinct firms, made up in part of the same persons, was held bad, for multifariousness. *Griffin v. Merrill, 10 Md. 364.*

So, where three persons had successively withdrawn from a firm, reducing the number from five to two, a bill praying for an account and settlement of the partnership concerns for the whole time was held to be bad, for multifariousness, and was dismissed. *White v. White, 5 Gill 359.*

VII. A bill is demurrable on this ground. A demurrer for multifariousness goes to the whole bill, and it is not necessary to specify the particular parts of the bill which are multifarious. *1 Dan. Ch. Pr. 559.*

Mr. S. H. Jones, for respondent.

I. The complainant's right to the relief prayed for, independent of his laches and the formal defects in the bill alleged by appellants, is undoubted. *Shaler v. Trowbridge, 1 Stew. 595.*

The rule embraces personal property, as well as real. *Id. 599.*

II. The complainant could have had no relief at law at any time in the premises to compel a conveyance from Mr. Wells, even had he recovered judgment against the defendant.

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ant, Wells, his partner, for the balance due on partnership account.

III. The statute of limitations could only be a bar to an account of transactions prior to January 24th, 1871, and will only be an objection to those claims set forth in the bill as arising prior to that time, whereas the larger part has arisen since.

The statute of limitations is only used in equity as a convenient measure of the length of time that ought to operate as a bar in equity of any particular demand. *Beckford v. Wade*, 17 Ves. 87, quoted in *Bowman v. Wathen*, 1 How. 189.

The time does not begin to run until the party aggrieved discovers the wrong done him. *Story Eq. Jur.* § 1521.

The wrong in this cause is not a failure to account, but is a fraudulent investment of partnership property, in real estate, in the name of the defendant's wife.

Though the bill does not state when complainant discovered the alleged fraudulent investments, this is no objection on demurrer, nor can it be determined from the bill when complainant began to be in laches, but unless this clearly appears from the bill, the statute of limitations cannot be taken advantage of by demurrer. *Story Eq. Pl.* §§ 503, 751.

A court of equity will not allow the bar of the statute of limitations to prevail by mere analogy to suits in equity, where it would be in furtherance of manifest injustice. *Story Eq. Jur.* § 1521; *Bond v. Hopkins*, 1 Sch. & Lef. 413, 431; 1 Fonbl. Eq. ch. 4, § 27, note q; *Hovenden v. Lord Annesley*, 2 Sch. & Lef., 630, 640; *Mayne v. Griswold*, 3 Sandf. 482.

The trust in Mrs. Wells to hold the lands in trust for the partnership, is one exclusively the province of chancery. Such a trust is not to be treated by analogy with the statute of limitations. *Kane v. Bloodgood*, 7 Johns. 90, 117.

IV. If a bill does not pray for multifarious relief, it cannot be objected to for multifariousness, though the case stated would support a prayer for multifarious relief. *Dick v. Dick*, 1 Hogan 290, quoted in 1 Dan. Ch. Pr. 342, note 1.

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A demurrer for multifariousness was denied where the bill prayed account of two estates, the accounts of which were inseparably connected. *Campbell v. Mackay*, 1 Myl. Cr. 603; *Lewis v. Edmunds*, 6 Sim. 251; *Carter v. Balfour*, 19 Ala. 814.

And of two agencies inseparably connected. *Benson v. Hadfield*, 5 Beav. 546.

A bill is not demurrable for multifariousness which unites several matters distinct in themselves, but which together make up the complainant's equity, and are necessary for complete relief. *Hicks v. Campbell*, 4 C. E. Gr. 183.

The question in such cases is mainly one of expediency in the conducting of suits, rather than of principle. *Emans v. Emans*, 1 McCart. 114.

V. The nature of the bill is stated generally in the opinion of the vice-chancellor. It is not open to the objections as to form alleged by appellants.

The defendant, Wells, is alleged to have been indebted, on January 1st, 1870, to the firm and to the complainant in the sum of \$19,000, which means that by reason of the state of the account between the partners the debt by Wells to the firm equalled his debt to Partridge at that time on account of the firm. In other words, that to make the complainant whole at that time Wells should have paid him \$19,000. And the same explanation applies to every similar statement throughout the bill.

PER CURIAM.

This decree unanimously affirmed.

Van Horn v. Pine.

GEORGE VAN HORN, appellant,

v.

LOUISA E. PINE, respondent.

On appeal from a decree of the chancellor, whose opinion is reported in *Pine v. Shannon*, 3 Stew. 501.

Mr. G. Collins, for appellant.

June 1st, 1878, a bill to foreclose a mortgage was filed in chancery, by Louisa E. Pine, against John Shannon, Willard E. Dudley and George Van Horn. John Shannon was made a defendant because he executed the mortgage; Willard E. Dudley, because he was then, and still is, the owner of the mortgaged premises, and George Van Horn, because he had issued an attachment out of the Hudson circuit court, against the complainant and her husband, and the same was served upon Willard E. Dudley.

John Shannon, subsequent to executing the mortgage to complainant, conveyed the mortgaged premises to Kate Hughes; Kate Hughes and husband conveyed them to Charles McDonald; Charles McDonald and wife conveyed them to Patrick McIntyre, and Patrick McIntyre and wife conveyed them to Willard E. Dudley, who assumed the mortgage and agreed to pay it, by a stipulation to that effect in his deed. None of the intervening owners of the mortgaged premises in whom the title had successively rested, from Shannon to Dudley, had assumed to pay the mortgage by their respective deeds.

June 7th, 1878, an amendment to the bill was filed, among other things striking out the prayer for deficiency against the defendant Dudley.

July 31st, 1878, defendant George Van Horn filed a general demurrer to the complainant's bill, as to himself, and, at the October term, 1878, of the court of chancery, argu-

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ment was heard and an opinion pronounced sustaining the demurrer.

December 14th, 1878, complainant filed an amended bill of complaint, making, therein, Melissa E. (wife of William E.) Dudley, John Linn, Robert O. Babbitt and Isaac I. Maine, additional parties, and setting up (which did not appear in the original bill) what had been attached by the sheriff under the writ of attachment issued by the defendant Van Horn against the complainant and her husband. The bill was, however, amended throughout in divers important particulars.

January 3d, 1879, defendant Van Horn filed a general demurrer to the amended bill of complaint, and, on argument thereof, proceeded to assign, for causes of demurrer, the same grounds, and in the same form, as stated in the petition of appeal in this cause to sustain the demurrer whereupon the chancellor refused to permit Mr. Van Horn to raise and discuss the second, third and fourth points stated, on the ground that the same were raised and argued or could have been raised, under the first demurrer (demurrer to original bill), and would only permit him to be heard on one point, viz., whether or not he was a necessary proper party to the suit. Mr. Van Horn contended that he could raise the same points, and new and additional points and cited, in support of the same, 1 *Dan. Ch. Pr.* (4th ed. 582, and the cases there cited, viz., *Bosanquet v. Marsh* 4 *Sim.* 576; *Bancroft v. Wardour*, 2 *Bro. C. C.* 66; *Robertson v. Lord Dundreary*, 5 *Sim.* 401; *Cresy v. Beavans*, 13 *Sim.* 3; *Willie v. Ellice*, 6 *Hare* 505, 510. See, also, *McKelvey v. New England Mfg. Co.*, 1 *Stock.* 376. And, thereupon, on hearing Mr. Van Horn on the point as to whether or not he was a necessary or proper party, the chancellor pronounced the opinion overruling the demurrer.

I. It is not shown by the amended bill that there is any debt owing from Dudley to Pine. Dudley, by his counsel from McIntyre, has assumed the mortgage made by S1

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non to Pine; but, none of the intermediate owners having assumed it, Dudley's assumption does not bind him; there is, therefore, no obligation on his part, by this assumption, to pay the mortgage debt; no personal action can be maintained by Pine against him to recover the amount of the mortgage debt; his land only is liable. There is no privity of contract between Pine and Dudley, shown by the bill, by which Pine can maintain a personal action against him for the amount of the mortgage debt. If, therefore, Pine can not maintain a personal action against Dudley, Van Horn cannot maintain his *scire facias* against him. Because Dudley assumed the mortgage made by Shannon in the deed from McIntyre to him, creates no privity of contract between Dudley and Pine. *Crowell v. Hospital of St. Barnabas*, 12 C. E. Gr. 152, 651.

The intermediate owners of the mortgaged premises, from Shannon to Dudley, had not assumed the mortgage in their deeds, so that no claim for deficiency can be made by Pine against Dudley in the foreclosure; indeed, none is claimed. Suppose Pine had instituted a foreclosure against Shannon, Dudley and wife only, leaving out Van Horn and applying creditors, and Van Horn had applied to be admitted as a defendant, setting up, as grounds for such admission, those stated in the bill, would not his application have been denied on the ground that no debt was shown to be owing from Dudley to Pine, and hence no debt had been attached? Suppose, again, Dudley had filed an answer to such a bill, setting up, as grounds of defence, the reasons assigned in the bill for making Van Horn a defendant, would not his answer have been overruled as setting up no defence, because no debt was shown to be owing from him to Pine, and hence no debt had been attached? To make it a defence, he would have to show how and in what manner it is claimed by Van Horn that there is a debt owing from him (Dudley) to Pine, and, in addition thereto, would have to admit his own personal liability thereon, so that a personal action therefor could be successfully maintained

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against him by Pine. If, therefore, there is no debt owing from Dudley to Pine, none has been attached; and if no debt has been attached, because none is owing, then Van Horn is really not a necessary or proper party.

For a debt to be owing from Dudley to Pine, it must be such an one that a personal action can be supported by Pine against him, and the full amount of the bond and mortgage, with interest and costs, recovered against him. As the matter stands, no such action can be supported, and the only liability that attaches to Dudley is, that a decree can be made against him for the sale of his land.

Again, suppose a judgment by default had been entered against Dudley on the *scire facias*, at the suit of Van Horn for the amount of his claim, and he had paid it, would Dudley have been entitled to an allowance for the amount thereof, out of the money to be raised under a foreclosure and sale of the mortgaged premises?

II. If Van Horn be a necessary or proper party to the foreclosure suit, then the auditor in attachment is a necessary party therein. *Brantingham v. Brantingham*, 1 Beas. 160; *McLaughlin v. Van Keuren*, 6 C. E. Gr. 379; *Wilson v. Bellows*, 3 Stew. 282.

III. Complainant is not entitled to any relief against Mr. Van Horn, because she has an adequate remedy at law.

A party cannot have relief in equity where he has an adequate remedy at law; a court of equity has no authority to correct alleged errors of a court of law, or to aid a party who, through his own negligence, has involved himself in difficulty. *Reeves v. Cooper*, 1 Beas. 223.

The rule is, if complainant shows by his bill that his remedy is complete and effectual at law, and sets up no particular title to the aid of a court of equity, the defendant may demur. *Egbert v. Hawk*, 1 Beas. 80. In this case bill was filed to compel the payment by garnishee of money attached. Bill dismissed.

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Equity will not interfere where adequate relief can be had at law. *Hoagland v. Township of Delaware*, 2 C. E. Gr. 106.

The judgment or decree of a court of general jurisdiction upon a subject matter within its jurisdiction, is final and conclusive, and can never be questioned in a collateral suit. *Young v. Rathbone*, 1 C. E. Gr. 224.

Objections relating to the regularity of a judgment at law, or to the validity of the instrument upon which it is founded, constitute no ground for the interference of equity. If the instrument upon which the judgment was entered was without consideration or invalid, or if the judgment was unauthorized or illegal, the remedy for the party aggrieved is by application to the court in which it was entered, or by writ of error. *Stratton v. Allen*, 1 C. E. Gr. 229; *Reeves v. Cooper*, 1 Beas. 223.

But the attachment act affords adequate remedy in case Plaintiff in attachment recovers judgment. By its terms, the Plaintiff and creditors, before they can receive a dividend, must give the auditor a refunding bond, with ample security, with condition, &c. (See attachment act concerning refunding bond.) *Schenck v. Griffin*, 9 Vr. 462.

Where there is adequate remedy at law, defendant may demur. *U. R. R. of N. J. v. Hoppock*, 1 Stew. 261.

The regularity of attachment proceedings at law, cannot be questioned collaterally in the foreclosure of a mortgage on the premises attached. *Hoppock v. Ramsey*, 1 Stew. 413.

A judgment can only be impeached for fraud in its conception, in a court of equity, and not for fraud in the instruments upon which it is founded. *Stratton v. Allen*, 1 C. E. Gr. 229.

In a foreclosure suit in which a judgment creditor in attachment claims the surplus money, it is not competent to show that such creditor had no such demand against the defendant in attachment as would sustain an attachment. Such judgment cannot be drawn in question collaterally. *Brantingham v. Brantingham*, 1 Beas. 160.

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IV. The bill is filed by Pine, the respondent, to foreclose a mortgage held and owned by her only, upon lands owned by Dudley. The decree in this case would be to sell the land of Dudley. Van Horn is made a party because he has recovered a judgment against the respondent and her husband. The decree in this case would be to declare void the judgment, although it is difficult to ascertain from the face of the bill what decree, if any, is prayed against him.

It is a rule in equity that two or more distinct subjects cannot be embraced in the same bill. The offence is termed multifariousness, and renders the bill liable to a demurrer. *1 Dan. Ch. Pr. (4th ed.) 334.*

“By multifariousness in a bill,” says Mr. Justice Story, “is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them, as, for example, the uniting in one bill of several matters perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill.” *Story Eq. Pl. 271.*

A bill which sets up distinct and different causes of complaint which destroy each other, and seeks different reliefs inconsistent with each other, is multifarious. *Swayze v. Swayze, 1 Stock. 273.*

If a bill unite a demand of several matters of distinct natures against defendants, it is demurrable for multifariousness. *Emans v. Emans & Wortman, 2 Beas. 205; Craigh v. Fairchild, 1 McCart. 76; Reed v. Reed, 1 C. E. Green 248, 250.*

The foregoing points assigned in the petition of appeal for causes of demurrer, go to the whole bill upon matters apparent on the face of the bill, and, under the form of a general demurrer for want of equity, all or any one of them may be assigned *ore tenus* on the argument. *Stilwell v. McNeely, 1 Gr. Ch. 305; Barret v. Doughty, 10 C. E. Green 380; Barnes v. Trenton Gas Co., 12 C. E. Gr. 35; Story Eq. Pl. (Redfield's ed.) 436, 505; 1 Dan. Ch. Pr. 559.*

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Mr. S. C. Mount, for respondent.

I. The defendant, Dudley, the owner of the equity of redemption in the mortgaged premises, still had a right to redeem the premises from the lien of the mortgage, though the day of redemption named in the mortgage had passed by without redemption being made.

The mortgagee claimed the whole money, and the defendant, George Van Horn, claimed a part of it, on the ground of a claim by him against the mortgagee, which claim she disputed. The owner of the equity of redemption could not safely pay the mortgagee the whole amount, because Van Horn's claim might be good for a part of it; nor could he safely pay Van Horn the amount he claimed, and the balance to the mortgagee, because the claimant might get a decree for the whole.

Van Horn stood in the position of exhibiting to Dudley an assignment, purporting to have been executed by the mortgagee, of a part of the money secured by the mortgage, and claiming thereunder a part of the mortgage debt, but the validity of which assignment she disputed.

And, therefore, the complainant, in proceeding in equity to foreclose the equity of redemption, unless payment should be made of the money secured by the mortgage, should make Van Horn, who claims a part of the debt, a party. He was a proper, if not a necessary, party to the suit. *Jones v. Mortgages* § 1368.

II. The record of the attachment was a lien upon the complainant's estate or interest in the mortgaged premises. *v. p. 45, §§ 18, 19, 20.*

II. No money had come to the hands of the auditor, and, under the statements in the complainant's bill, none would come to his hands.

7. The demurrer to the whole bill is irregular. It should have been confined to the question of the sufficiency

Potter v. Gibbons.

of the amendments, to meet the requirements of the court, in the chancellor's former opinion.

PER CURIAM.

This decree unanimously affirmed.

HENRY L. POTTER, appellant,

v.

ALPHEUS D. GIBBONS, respondent.

Mr. J. Henry Stone, for appellant.

Mr. Thomas S. Shafer and *Mr. William J. Magie*, for respondent.

PER CURIAM.

This decree unanimously affirmed for the reasons given by the vice-chancellor in *Gibbons v. Potter*, 3 Stew. 204.

NOTE.—In this case, no briefs were furnished to the reporter.—REP.

CASES
ADJUDGED IN
THE COURT OF CHANCERY
OF
THE STATE OF NEW JERSEY,
OCTOBER TERM, 1879.

THEODORE RUNYON, ESQ., CHANCELLOR.

ABRAHAM V. VAN FLEET, ESQ., VICE-CHANCELLOR.

JOHN D. CREGAR

v.

HARMON H. CRAMER and others.

A judgment at law was recovered by the complainant against the defendant and one M., on a joint and several promissory note given by them to complainant, for a partnership debt. At the defendant's repeated requests, and on his promise to pay one-half of the judgment and costs if he would do so, the complainant obtained from M. payment of one-half and released him from all liability on the judgment. —*Held*, that the defendant should be enjoined from taking advantage at law of such release to cancel the judgment, and thereby avoid the payment of his share.

Bill for relief. On final hearing on pleadings and proofs.

Mr. J. T. Bird, for complainant.

Mr. R. S. Kuhl, for defendant Cramer.

Cregar v. Cramer.

THE CHANCELLOR.

The complainant seeks by this suit to restrain the defendant, Harmon H. Cramer, from taking advantage of a release given by the former to William McCatharn, on the 2 of April, 1875, by which, in consideration of the payment to him of \$267.65, he released McCatharn from his lands, and land conveyed away by him, from a judgment recovered by the complainant against McCatharn and Cramer, in the Hunterdon circuit court, on the 18th of June, 1874. The consideration of the release was one-half of the amount of the judgment and interest, and sheriff's execution fees. He alleges that the release was given in pursuance of a request on the part of Cramer that he would collect one-half of the judgment from McCatharn, and Cramer promise that, if the complainant would do so, he would once pay the balance of the judgment. The release was given in substitution for a receipt and discharge from the judgment given by the complainant's attorney to McCatharn, on the payment of the money, but which was not satisfactory to the counsel of the latter.

The judgment was recovered on a joint and several promissory note given by McCatharn and Cramer to the complainant, on the 22d of October, 1873, payable five months after date, for \$432.51 with interest. Though the answer of Cramer substantially alleges that he was mere surety upon the note, yet it clearly appears that such was not the fact, but that it was given for a partnership debt, due from him and McCatharn to the complainant, goods sold by him to them. Mr. Sanderson, the complainant's attorney in the suit in which the judgment was recovered, testifies that he had several conversations with Cramer after the judgment was recovered and levies made under the execution thereon; that in one of them, which took place in March, 1875 (the judgment was, as before stated, recovered in June, 1874), Cramer expressed a wish that he would get McCatharn to pay half of the judgment and promised that if he would do so, he would himself pay

Cregar v. Cramer.

the other half. He mentions the place where the conversation took place, and it is enough to say that there is corroboration of his testimony in that of Cramer himself. Mr. Sanderson testifies that in the various conversations which he had with Cramer on the subject of the judgment, the latter urged him to make haste to compel McCatharn to pay his half of the judgment, giving as his reason his apprehension that the latter was in failing or doubtful circumstances, and promised that, if he would get McCatharn to pay half, he would himself pay the balance. Cramer himself appears to have repeatedly urged the complainant in like manner, to collect half of the judgment from McCatharn, making the same promise, and stating that half of the judgment was his just share to pay.

Lambert Sutton, sworn for Cramer, testifies that the latter said that "one-half of the note was his," and that he "wanted" the complainant "to make the other half out of McCatharn." He also says, corroborating the complainant, that in a conversation circumstantially sworn to by the latter, Cramer said to the latter that he "must make the half of the money out of McCatharn, or after a while the stuff" (referring to McCatharn's personal property, which had been levied on under the execution) "would get away and he would have it all to pay; that he was ready to pay his half at any time." Moreover, McCatharn swears that, in a settlement between him and Cramer, it was agreed that each of them should pay half of the note.

There is no room to doubt that the complainant accepted from McCatharn one-half of the amount of the judgment, in discharge of his liability thereon, in consequence of Cramer's repeated requests, and for the accommodation of the latter, and to secure him from loss, and on his promise that, if he would do so, Cramer would pay the balance, which he at the same time acknowledged he was, as between him and McCatharn, justly bound to pay. The attempt on his part to take advantage of the release to procure the cancellation of the judgment (as he might at law, *Rogers v. Hosack's*

Rennie v. Deshon.

Ex'r, 18 Wend. 319 ; *Cheetham v. Ward*, 1 Bos. & Pul. 63 ; *Kirby v. Taylor*, 6 Johns. Ch. 242), and so avoid payment of the half which he had promised to pay, was in the highest degree inequitable. He will be perpetually enjoined from applying for the entry of satisfaction of the judgment on the ground of the release, or the receipt and discharge, and from pleading or setting up them, or either of them against his liability on the judgment, or as evidence of his non-liability, or that of his property, to the payment of the remaining half of the amount of the judgment and interest, and it will be declared that the release and receipt and discharge will not operate to discharge the judgment as against him, or to discharge his property from the judgment or execution issued or to be issued thereon, so far as that half is concerned ; but that, as between him and the complainant, the judgment and any execution or executions thereon shall be as valid and effectual as if the release had not been executed, nor any agreement to discharge McCatharn made ; and Cramer will be required to pay the costs of this suit.

ROBERT RENNIE and others

v.

HENRY S. DESHON and others.

In order to secure the creditor of a corporation for moneys loaned and afterwards to be loaned, the owners thereof (the complainants) assigned to such creditor a controlling part of the stock, and one of them also assigned bonds owned by him individually, and the corporation gave a mortgage on its works. On a bill filed against such creditor a bank that had discounted his notes for the benefit of the corporation and held some of his collaterals therefor, and the corporation, to redeem the stock and bonds, and for an account,—*Held*,

(1) That such bill was not multifarious.

Rennie v. Deshon.

(2) That there was no misjoinder of complainants, since all the collaterals were to secure the same liabilities, and,

(3) That a general offer to pay any amount found due, was sufficient to entitle complainants to an account.

Bill for relief. On general demurrer by all the defendants.

Mr. Oscar Keen, for demurrants.

Mr. W. M. Johnson and *Mr. J. Wilson*, for complainants.

THE CHANCELLOR.

The bill is filed by Robert Rennie and William Rennie, against Henry S. Deshon, The Mechanics National Bank of the City of New York, and the Lodi Chemical Works, for an account and other relief in connection therewith. It states that Deshon was the creditor of the Lodi Chemical Works, a corporation of this state, and, in view of the indebtedness, and in contemplation of an increase thereof, an arrangement was made between him and the complainants, by which, at once to secure him therefor and provide the means of payment thereof, the control of the corporation and its affairs was placed in his hands, through the transfer by the complainants, to him, of large amounts of its capital stock, belonging to them severally; and as security to him, and, at the same time, to provide him with means of borrowing money to lend to the corporation, Robert Rennie assigned to him certain railroad bonds belonging to him, for some of which the corporation substituted its mortgage of its property to secure the payment of \$50,000. The bill further states that the Mechanics Bank of the City of New York is the holder, by assignment, of the remaining railroad bonds and the mortgage and stock, as security for advances to, or discounts for, Deshon; and alleges that the bank had, when it took those securities, full notice that Deshon's title thereto was defeasible, and that he held them

Rennie v. Deshon.

merely as such security, as before mentioned. It seeks to redeem the stock and bonds, and, to that end, prays an account from Deshon and the bank, and offers to pay whatever may appear to be due to the former, and prays subrogation to the rights of Deshon and the bank, under the mortgage, as against the Lodi Chemical Works, as security for any amount which they may be compelled to pay for that corporation in effecting the redemption.

The defendants insist that the bill is multifarious, or that there is a misjoinder of complainants. But the stock of each of the complainants and the bonds of Robert Rennie are, together, held as security for the same liabilities. Neither could compel a transfer of his property on payment of part only of the debt. They, therefore, necessarily seek an account together, and, under the circumstances stated in the bill, they are entitled to it.

It is also objected, on behalf of the demurrants, that the complainants make only a general offer to pay any amount which, on the account, may appear to be due to Deshon, and that they ought to have specified the amount which they were willing to pay. It is enough to say that they pray a discovery, because they are ignorant of the condition of the accounts, and in order to ascertain how the accounts stand. To require them, under such circumstances, to specify the balance, would be to require an impossibility. But, further, under the circumstances they are entitled to an account, without an offer to pay any balance which may appear to be due to Deshon. *Colombian Government v. Rothschild*, 1 Sim. 94; *Clark v. Tipping*, 4 Beav. 588.

The demurrer will be overruled.

Forbes v. Baaden.

ROSETTE D. FORBES

v.

GEORGE F. BAADEN and wife and others.

Money paid to a mortgagee's agent, in pursuance of an agreement between such agent and the mortgagor, as compensation for, and as consideration of, procuring the mortgagee's forbearance, no part thereof being received by the mortgagee, cannot be deducted on the foreclosure of the mortgage, as usury.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. M. W. Niven, for complainant.

Mr. T. Ryerson, for Baaden and wife.

THE CHANCELLOR.

This is a suit for foreclosure and sale of mortgaged premises in Jersey City. The mortgage was made by Baaden and wife to William H. Child, to secure the payment of \$3,775, with interest. Child assigned it to the complainant. The defence is usury. The answer, which is filed by Baaden and his wife, sets up an agreement by them with the mortgagee, on the making of the loan, for a premium of \$150 for the loan, which, they say in the answer, was added to the sum of \$3,625. According to the answer, the interest was added to the amount of the loan, and, with it, secured by the mortgage. The proof fails to support the defence. Baaden, who alone swears to the alleged agreement, explicitly admits, in his testimony, that there was due \$3,775, when the mortgage was made, the sum of \$3,775, the amount for which it was given. Besides, Child swears that he did not make the alleged agreement.

 Appleton v. Small.

Baaden testifies that he paid the complainant \$400, in two payments of \$200 each, for interest beyond the legal rate. Nothing is said on this subject in the answer. It appears that the money was not paid to the complainant at all, but to William H. Havens, who, at the time, was her agent to collect the interest on the mortgage. It also appears that she never received it, or any part of it. It was paid to Havens, as he swears, as his commission for obtaining further forbearance, and was paid pursuant to an agreement between him and Baaden to that effect. Baaden, on being recalled, admits that it was not paid for interest. The complainant is not chargeable with the money. There will be a decree in accordance with the above conclusions.

 DANIEL F. APPLETON

v.

BENJAMIN F. SMALL and wife and others.

An alleged mistake in the description of lands in a release of part of premises covered by a mortgage, such release having been given by the mortgagee, cannot, on foreclosure, be set up to the detriment of an assignee of the mortgage.

Bill to foreclose, and cross-bill for reformation of release. On final hearing on pleadings and proofs.

Mr. Leon Abbett, and *Mr. W. J. A. Fuller* of New York, for complainant.

Mr. G. A. Kingsley, for defendants Stone and wife.

Mr. J. W. Field, for Jewell & Sons and Alfred Spence.

Appleton v. Small.

THE CHANCELLOR.

The original suit is brought to foreclose a mortgage given by the defendant Small, and his wife, to the Howard Savings Institution, dated August 23d, 1867, on land in West Orange, in the county of Essex, to secure the payment of \$9,000 with interest, and assigned to the complainant in that suit in 1871. All the land covered by the mortgage has been released except three parcels, the legal title to one of which, a piece six inches wide, is in the mortgagor, Small; the title to another in the defendant Stone, and the title to the rest is in the defendant Benjamin Finch. The only question presented for adjudication is as to the relief prayed by the cross-bill. That bill was filed by the defendant Stone, for the reformation of a release given by the Howard Savings Institution, to Small, dated June 11th, 1870, and recorded on the 12th of October following, by which the institution released from the incumbrance of its mortgage, a part of the mortgaged premises by a description which began at a point on the southerly side of Fairview avenue, at a specified distance from a designated road, and then described the property released by courses and distances, and metes and bounds. Stone alleges that the beginning point was erroneously, and by mutual mistake of the parties to the instrument, stated in the release to be eight hundred and twenty feet from the road, instead of eight hundred and ninety-five feet and six inches, and asks that the deed be rectified accordingly. But there is no proof whatever of mutual mistake.

The savings institution appears to have released exactly what it was asked to release. It is urged, on behalf of Stone, that in the application for the release it was requested to release the part of the mortgaged premises which had previously been mortgaged by Small to Wheeler Lindsley, by mortgage dated March 1st, 1870, and registered on the 5th of October following. But it does not appear, by the written request for the release, that there was any connec-

Appleton v. Small.

tion between the release and the Lindsley mortgage. The request was made by Small, through his attorney, and states that he is desirous of having two acres (without other or further designation) of the premises mortgaged to the institution, released from the incumbrance of the mortgage of the latter, to enable him to cut the two acres up into building lots, and erect some houses thereon, which, he adds, will enhance the value of the remainder of the mortgaged premises. No reference is made in any way to the Lindsley mortgage.

There was nothing to show or suggest to the savings institution that there was probably a mistake in the description. It began at no monument, landmark or line, but merely at a point located at a certain distance from a road, and no mistake was shown or suggested by any bound, monument, landmark, course or distance. As against the savings institution, were it still the holder of the mortgage, there would be no equity to reform the release. As against the complainant in the original bill, who had no notice of any claim that there was a mistake until after his bill was filed (for Stone alleges that it was not until after this suit was brought that it was discovered that there was any mistake), there is of course none. *Lozey v. Simpson*, 3 Stock. 246; *Danbury v. Robinson*, 1 McCurt. 213; *Starr v. Hekins*, 11 C. E. Gr. 414.

The cross-bill will be dismissed, with costs, and there will be a decree in the original suit for foreclosure and sale. The Finch property should be first sold. Finch agreed with Small that he would pay the complainant's mortgage, and the amount of it was allowed to him as so much of the consideration of the conveyance of the property.

Gawtry v. Leland.

WILLIAM M. GAWTRY and others

v.

WARREN LELAND SR. and others.

Lands bordering on the ocean by a bluff, were conveyed expressly to a covenant that the grantee, his heirs &c., would not at any thereafter build or suffer to be built, erected or moved, any building or structure on any part of the lot eastward of a designated line, so that they would not suffer to be done any act, matter or thing which might at any time thereafter in anywise obstruct or interfere with the view or prospect from the adjoining hotel of the grantor of that part of the lot, but that the grantee, his heirs or assigns, nevertheless, erect any bough-house on the margin of the ocean front of the lot, or any bath-house at the foot of the bank.—*Held*, that the construction of a pavilion along the entire ocean-front of the lot (though of no greater height than a bough-house) is a violation of the covenant, both from its extent and its obstruction of the view. The fact that a portion of such pavilion extends below high-water mark, upon lands belonging to the state, is no justification for its construction in violation of the covenant.

The owner of land the surface water from which usually flows into his neighbor's lands, has no right to permit it, after being mixed with noxious matter on his land, to flow on the lands of his neighbor.

Bill for injunction. On motion to dissolve, on bill and answer and affidavits.

For John E. Lanning, for the motion.

For R. Allen Jr., contra.

THE CHANCELLOR.

The complainants, who are the owners of the Mansion House hotel premises at Long Branch, and keep the hotel, bring suit against the Messrs. Leland, defendants, who own the property known as the Ocean Hotel property, and keep that hotel, to restrain them from violating a covenant against

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building upon a part of the land of the latter; and, also, —
 restrain them from building on the land of the complai —
 ants, and against continuing a nuisance of foul water flo —
 ing from their land upon that of the complainants, to a —
 under their stables (in which are kept a large number of
 horses), to their great annoyance and injury.

The premises upon which is being erected on the la —
 of the defendants that part of the building complained of,
 are the southern part of the Ocean Hotel property, and are
 about one hundred and forty feet in front on the ocean.
 They are the extreme easterly part of a lot of about th —
 ree acres and a half, which was sold and conveyed by Samuel
 Laird to Woolman Stokes, in March, 1859, under which con —
 veyance the defendants derive their title to the lot. The com —
 plainants hold their title to the Mansion House property
 also under Laird, but through conveyances subsequent to that
 made to Stokes. When the conveyance to Stokes was
 made, the Mansion House property was owned by Laird,
 and occupied by him for the uses of a summer hotel, to
 which it is still devoted. The conveyance to Stokes was
 expressly subject to the terms and conditions of an agree —
 ment made by and between Stokes and Laird, dated January
 26th, 1859, and recorded in the Monmouth county clerk's
 office, in respect to the sale and conveyance of the lot —
 of three acres and a half by the latter to the former. By that
 agreement, Laird covenanted to convey the property to
 Stokes, for the consideration therein mentioned; and
 Stokes, on his part, covenanted for himself, his heirs,
 executors, administrators and assigns, that he and they
 would not, at any time thereafter, build, or suffer to be
 built, erected or moved, any buildings or structure, on any
 part of the lot which lay eastward of a line six chains and
 twenty links from the rear of the west line of the lot, and
 that he, his heirs or assigns, would not suffer to be done any
 act, matter or thing which might, at any time thereafter, in
 anywise obstruct or interfere with the view or prospect from
 the Mansion House, across the eastward part of the lot, and

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that Laird, his heirs or assigns, might forthwith abate any such obstruction or erection from the eastward part of the lot, without any molestation from Stokes or his representatives; but it was provided that nothing therein contained should be construed to prevent Stokes, his heirs or assigns, from erecting any bough-house on the margin of the ocean bank of the lot, or bath-house at the foot of the bank.

By the agreement, Laird and Stokes bound themselves, their heirs, executors, administrators or assigns, each to the other, in the sum of \$500 liquidated damages, to be paid by the party violating the agreement to the other party; but it was thereby declared to be further agreed, that the payment of the liquidated damages should not be construed to allow either of the parties to violate, or to continue to violate, any of the agreements.

The complainants allege, and it appears, that the Lelands, in violation of the covenant not to build or obstruct the view, are constructing a building along the entire ocean front of the Stokes lot, and extending beyond the line, upon the complainants' land adjoining. They allege, and it appears, also, that the defendants have no right to build upon the land of the complainants. It is insisted by the complainants, that the building on the defendants' land will materially interfere with and obstruct the view of the ocean from the Mansion House, to the serious damage of the complainants, and materially diminish the value of their property.

The defendants admit that a small part of the building is (but, they allege, merely by mistake) being constructed upon the land of the complainants, without right or authority to put it there. As to the rest of the building, they insist that it is within the exception in the covenant; that it is only an improved bough-house; and, also, that it will not materially obstruct the view. They allege that it is built, in part, upon land the title to which has been derived from the state of New Jersey, being below ordinary high-water mark, and that the complainants have acquiesced in the construction of the

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building, with full knowledge of its character and proposed extent, for so long a period as to debar them from any right to the enforcement of the covenant in equity.

The existence of the covenant, and the reference to it in the deed, are admitted. The defendants claim to have acted in actual ignorance of either, but they are, of course, under the circumstances, chargeable with knowledge of both. The building is what is known as a pavilion, extends along the whole front of the Stokes lot, and is intended to be permanent. The covenant provides against the erection of any building or structure on that part of the lot, except a single bough-house, which is understood to be a rustic summer-house of but small dimensions, constructed in part of the boughs of trees, and intended merely to furnish a seat for a few persons, in the shade, on the bank of the ocean. If it were to be held that, in character, the pavilion is substantially the same as a bough-house, yet, by its extent, it would be a violation of the covenant. It is obvious that it was the intention of the parties to stipulate that the ocean front of the lot should be kept free from everything which could, in any way, to any considerable extent, obstruct the view of the ocean over it from the Mansion House. It was manifestly not within their intention to authorize the construction of a building which, though not higher than a bough-house, or in its construction more obstructive of the view than such a house of the same extent would be, would extend along the entire front of the lot. It is not to be forgotten that the covenant expressly provides against any building or structure except a bough-house. A reasonable construction will be given to the covenant; one in accordance with the intention of the parties.

In *Kirkpatrick v. Peshine*, 9 C. E. Gr. 206, it was held that the erection of a bay-window, extending beyond a certain line, was a violation of an agreement that the building should not extend beyond that line, and that equity would restrain such violation.

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In *Child v. Douglas, Kay 560*, it was held that the building of a wall or fence of fifteen feet high, across a strip upon which the defendant was bound, by covenant, not to erect a building, would be a violation of the covenant.

The building in question is manifestly a violation of the covenant.

As to the claim that a portion of the building is on land below the high-water line of the ocean, it appears that but a very small and inconsiderable portion (a corner) is over the line. Covenants controlling the enjoyment of land, even though not binding at law, will be enforced in equity, provided the person into whose hands the land passes, has taken it with notice of them. As before stated, notice of the covenant in this case must be imputed to the defendants.

They, therefore, should be restrained, unless the defence of acquiescence set up in their answer is to prevail. That defence, however, is met and overthrown upon this motion by the explicit, positive, thorough and unequivocal denial of the complainants as to their knowledge of the plan and construction of the work prior to the time of giving notice to the defendants that they must not proceed with the building, because it was in violation of the covenant.

It remains to consider the other feature of the case—the alleged nuisance of foul water which the defendants permit to run from their premises upon those of the complainants. The flowing of the water is not denied, nor is it denied that it is combined with foul liquids and substances from the cesspools and gas-works of the defendants upon their premises; but it is insisted that the water is only surface water which collects upon the defendants' premises in considerable quantities, in one corner thereof, because of the fact that the complainants have raised the grade of an adjoining road belonging to them, and filled a ditch alongside thereof, through which the water from the defendants' premises previously was discharged; and it is said that this water so collected is made to overflow and run upon the complainants' land by the increase of the surface water in

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times of rain. The evidence shows that the water is of very objectionable character, and a nuisance upon the complainants' premises. Although the right of the defendant to permit the surface water to collect and remain on the premises, so long as it does no injury to others, is not disputed, it is clear that it is their duty, if such water become offensive from the substances or liquids upon their land, to prevent it from flowing upon the land of the complainants, and the fact that the offensive water is surface water will not discharge the defendants from the duty of so using their premises in respect thereto as not to injure their neighbors. The motion will be denied, with costs.

HANNAH E. SWALLOW

v.

CLARISSA SWALLOW and others.

A testator devised to his two sons, William and Enoch, in fee, in equal shares, all his lands &c., but if either of them died without leaving lawful issue, the widow of such decedent should, so long as she remained such widow, receive one-third of the rents of the real estate devised to such decedent, and after her decease that real estate should be equally divided among all the testator's children then living. Enoch died after the testator, leaving a widow, but no lawful issue. By a voluntary partition between William and Enoch, certain lands were set off to Enoch as his share, and these lands Enoch afterwards conveyed to his wife, the complainant. On a bill by her against all of Enoch's brothers and sisters for an account of one-third of the rents and profits of the lands so set off to Enoch,—*Held*,

(1) That Enoch's conveyance to the complainant is no bar to her account, because Enoch's estate therein, and of course complainant's, was determined by his death without lawful issue.

(2) That complainant is not entitled to an account of the rents and profits against those of Enoch's brothers and sisters who have not been in possession of the premises nor received any part of the rents.

(3) That a receiver will not be appointed, since the complainant may obtain possession of her portion of the premises and manage it for herself.

Swallow v. Swallow.

Bill for an account &c. On final hearing on pleadings and proofs.

Mr. J. A. Bullock, for complainant.

Mr. H. A. Fluck, for answering defendant.

THE CHANCELLOR.

Nicholas Swallow by his will devised to his two sons, William and Enoch, in fee, in equal shares, all his lands, tenements, hereditaments and real estate, with a specified exception, subject to certain charges. He also ordered that if either of them should die without leaving lawful issue, the widow of the decedent should, so long as she remain such widow, receive one-third of the rents of the real estate devised to the decedent; and he also directed that after her decease, that real estate should be equally divided among all his (the testator's) children then living. Enoch died June 4th, 1868, after the testator's death, leaving no issue, but leaving a widow. She was not his wife when the will was made, but became his wife, however, before the testator's death. The bill is filed by her against the brothers and sisters of Enoch, and the husbands of those of the latter who are married, for an account and payment of one-third of the rents and profits since April 1st, 1874, of the part of the real estate so devised to William and Enoch, which, by a voluntary partition between them and mutual releases, was set off to the latter.

The answer of Clarissa Swallow (who is the only defendant who has answered) raises a question of construction of the will, as to whether the complainant is entitled to the benefit of the provision for the widows of the testator's sons, seeing that she was not the wife of Enoch when the will was made. It also sets up a conveyance by deed, made by Enoch to another person, for the property released to him, and a conveyance of the property by his grantee to the complainant. It also alleges that Clarissa Swallow has not

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been in possession of the property during the period in respect to which the account is claimed, and that she is, therefore, not liable to account to the complainant in respect to the rents and profits.

The question of construction was adjudicated upon in favor of the complainant, in *Swallow v. Swallow's adm'r*, 12 C. E. Gr. 278. It may be added to what was said there, that it is noteworthy that the provision is not for the widow of Enoch alone, but for the widow of either of the sons.

Obviously, the conveyance set up in the answer can have no effect upon the complainant's claim. Her husband's estate in the property was a fee defeasible on his dying without leaving lawful issue, and he having died without leaving lawful issue, on his death the estate conveyed to her was determined.

It is insisted by the complainant's counsel that the question of the liability of the defendants was also passed upon in *Swallow v. Swallow's adm'r*, favorably to the complainant, and adversely to the defendants in this suit. That cause came before me on a rehearing of a decree advised by the vice-chancellor. His conclusion as to the persons who were liable to pay the rent to the complainant for the time she had been out of possession, was approved, and it was held that she, being out of possession, was entitled to the third of the rents at the hands of those who had held the possession actually or constructively as against her, and that under these circumstances all of them were chargeable. The testimony warranted the conclusion that the persons against whom the decree was made were either actually in possession, or, if not, were represented in the possession by those who were actually in possession. Indeed, it appears by the testimony in this case that the possession in question in that suit was by concert between those in actual possession and the other children of the testator.

But the question now presented is, whether one who has not been in possession, either actually or constructively, and who has in no way kept the complainant out of possession,

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ed any part of the rents or profits, is chargeable complainant's share of the rents which were or have been obtained from the premises. It appears by the testimony that the answering defendant has not been in possession, and has exercised no control over the land and that she has not received any of the rents or profits during the period for which the account is claimed. The land devised to Enoch passed in fee, on the death of his brother and sisters. Their estate, however, was a life-estate; it is defeasible by their death in the lifetime of the complainant. They are not bound to till or cultivate the property for the benefit of the complainant, any more than she is bound to till or rent it for them. If they do not go into possession of the property, she is entitled to receive from the possessor or possessors one-third of the net value. If they rent it, she is entitled to one-third of the rents. She has a life-estate in one-third of the land, and for the devise of one-third of the rent is, in the absence of any expression of a different intention, tantamount to a devise of one-third of the land. *Diamant v. Reed*, 220; *Reed v. Reed*, 9 Mass. 372. She is entitled to an account as against those of the defendants who have been in possession of the property since April 1874, but not as against any others of them. It was suggested on the hearing that the court would appoint a receiver to manage the property. The case is not such that the court will appoint a receiver. The complainant may obtain possession of her just share of the property and manage it for herself. Of the defendants, William Swallow and Joseph Hampton and his wife are the only ones who can be required to account. William Swallow claims to have had possession for 1874, and the defendant claims for the two following years. There is no evidence that they took possession by concert with any of the other defendants. Joseph Bond had possession for 1877, but was not a party to the bill, and it does not appear by the evidence that he went into possession. From the evi-

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dence, \$150 a year would be reasonable rent for the property while possession was held by William Swallow and the Hamptons. The bill will be dismissed with costs as to Clarissa Swallow, and as to the other defendants, except William Swallow and the Hamptons, it will be dismissed without costs.

FREDERICK R. COUDERT and others, trustees,

v.

WILLIAM FLAGG and others.

Part of a commission charged for negotiating a loan was retained by the attorneys of the loaner for professional services connected therewith, and deducted from the amount loaned, no part being received by the mortgagee.—*Held*, that such mortgage was not usurious, although it was taken in the name of the attorneys as trustees for the loaner.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. E. W. Runyon, for complainants.

Mr. J. H. Jackson, for Flagg.

THE CHANCELLOR.

The complainants' bill is filed for foreclosure and sale of certain mortgaged premises in Plainfield. The mortgages are dated June 16th, 1876, and were given to secure the sum of \$19,500 with interest. The defence is usury. It appears from the evidence, that the defendant Flagg, the mortgagee, applied to Mr. Mellick, a real estate agent and negotiator of loans, to obtain for him a sum of money on mortgage of the premises. He wanted \$20,000. The agent sub

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lately applied to Messrs. Coudert Brothers, attorneys and counsellors-at-law, of the city of New York, for the desired loan. One of the members of that firm examined the property, and they agreed to loan for clients of theirs in France for whom they were trustees), for investment, the sum of \$19,500, on the terms of a bargain previously made between Mr. Mellick and Mr. Flagg, by which the former was to have a commission of ten per cent. for obtaining the loan. The loan was made, and the bond and mortgages given to secure it accordingly, a commission of ten per cent., amounting to \$1,950, being paid for the loan. Of this sum, part went to Mr. Mellick, part for searches of the title &c., and a considerable portion to Messrs. Coudert Brothers. The whole \$19,500 were furnished and paid out of the funds of the before-mentioned clients of the latter. The clients received no part of the commission, nor any advantage therefrom. The Messrs. Coudert Brothers were evidently acting in the business merely as attorneys, and, therefore, the fact that they received part of the commission will not render the securities taken for the loan usurious, nor make the lenders chargeable with their action. The fact that the mortgage was taken in their names, as trustees, will make no difference. *Dayton v. Moore*, 3 Stew. 543.

There will be a decree for the complainants, for the principal money of the mortgages and the interest thereon.

CATHARIND OLIVA, executrix &c. of Sebastiano Baccigalupo, deceased,

v.

GABRELLO BUNAFORZA and others.

1. A bill that seeks to establish the lien of an equitable mortgage on lands, against the mortgagor, his grantee and a mortgagee of the latter with notice of such equitable lien, is not multifarious.

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2. The covenant under which the equitable mortgage is claimed included all of the covenantor's property, both real and personal, and especially a certain house and lot, describing it.—*Held*, that it was valid.

3. That the orphans court which granted letters testamentary, did not require security from an executrix, because she had remarried, constitutes no objection to her proceeding in this court.

4. Although the husband of an executrix is a proper party, his non-joinder cannot be taken advantage of by general demurrer.

Bill for relief. On general demurrer.

Mr. G. Collins, for demurrants.

Mr. H. Wallis, for complainant.

THE CHANCELLOR.

The bill is filed to enforce the lien of an equitable mortgage on a lot of land in Hoboken, conveyed to Gabrello Bunaforza, by John Gormley and wife, February 27th, 1872, and being lot No. 5 in block No. 18 on a map of property belonging to the estate of John G. Coster, deceased, filed in the clerk's (now register's) office of Hudson county. The lien is claimed under two instruments of writing, one dated January 1st, 1872, and the other July 19th, 1873, made and given by Gabrello Bunaforza to Baccigalupo, by the former of which Bunaforza acknowledged that he had received from Baccigalupo \$750 as a loan, which he thereby promised to repay in one year, with interest half-yearly, and covenanted that, in case of default in the payment of principal or interest when due, he would give to Baccigalupo, his executors, administrators or assigns, a good and sufficient instrument of mortgage on all or any of his property, both real and personal, and especially on the lot and building thereon "situated in Newark street, block 18, in the city of Hoboken, state of New Jersey." The covenant is followed by the declaration that the money had been kindly lent to Bunaforza by Baccigalupo, to pay the purchase-money of

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that lot, and was to be considered as a part of the purchase-money thereof. By the other instrument, the time for payment of the principal of the loan was extended for a year longer (to the 1st of January, 1874), and Bunaforza covenanted faithfully to execute the covenants of the former instrument. The money has never been repaid. Baccigapupo died in 1875, leaving a will, of which the complainant is executrix. Shortly after his death the complainant again married, and, after her second marriage, proved the will and received letters testamentary thereon. On the 14th of August, 1873, Bunaforza and his wife conveyed the lot to Antonio Quirolo. By deed dated two days afterwards, Quirolo and his wife conveyed an undivided half of the property to the wife of Bunaforza. By mortgage dated January 6th, 1876, Quirolo and his wife mortgaged the whole of the property to Felice Quirolo to secure the payment of \$600 and interest. By deed dated November 25th, 1876, Bunaforza and his wife conveyed the undivided half of the premises to Antonio Quirolo, and thus the legal title to the whole was again vested in the latter, but subject to the mortgage to Felice Quirolo.

The defendants insist that the bill is multifarious; that there is a defect of parties, because the husband of the complainant is not a party to the suit; that the agreement is on its face void, because it promises to mortgage all the covenantor's property; that the averment of notice to the Quirolos is insufficient, and that, inasmuch as the bill shows that the complainant married after the death of her husband, she should not be permitted to act as executrix until it appears that she has given security.

There is clearly no ground for the criticism that the bill is multifarious. The complainant seeks to establish the lien of an equitable mortgage against the mortgagor and his grantee, and an encumbrancer who holds a mortgage given by the latter.

As to notice, the bill not only alleges that the defendants all had full knowledge of the agreements on which the com-

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plainant's claim is based, but it goes further, and says that the deeds and mortgage under which they respectively claim, were made with the intention of defeating and preventing the enforcement of the covenant. The objection is based on the ground that the covenant promises to mortgage all the covenantor's property, is untenable. It is enough to say that the covenant is particularly directed to a specified lot. *Shakel v. Duke of Marlborough*, 4 Madd. 103; *Jones on Mortgages* § 163. Nor can the objection based on the statute which authorizes the orphans court to require security of an executrix who marries after the grant of letters testamentary, be maintained. It appears, it may be remarked, that the executrix remarried before the grant of letters. This court will not go behind the letters. *Ex'r v. Ryno's adm'r*, 12 C. E. Gr. 522. There is a defect in the parties. The husband of the complainant should be joined with her. *Williams on Ex'rs*, 965; 1 *Bishop's Law of Wom.* § 90. The demurrer is a general one, however; a demurrer for want of parties should be special. *4 Ch. Pl.* 180; *Willis's Eq. Pl.* 462. It will be overruled with costs, with leave to amend it in ten days from the date of the order, unless the complainant shall, in the meantime, amend by making her husband a party complained with her.

 THOMAS STEWART, executor &c.,

v.

JANE STEWART and others.

1. In order to avoid a will for uncertainty, it must be incapable of any clear meaning.

2. A wife will be put to her election between a testamentary provision in her favor and her dower, when it clearly appears from the will that the testamentary provision was intended as a substitute for dower.

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the legal one, and the intention will be implied if the claim of dower would be clearly inconsistent with the will.

3. Gifts to "my beloved sons," naming three persons, are good, although two of them are illegitimate.

Bill for construction of will. On final hearing on bill and answer.

Mr. A. B. Woodruff, for complainant.

Mr. S. Tuttle, for the answering defendants.

THE CHANCELLOR.

David Stewart, of the city of New York, by his will, dated April 19th, 1877, provided as follows:

"First—After all my just debts and funeral expenses are paid and discharged, I do hereby order and direct that, as soon after my

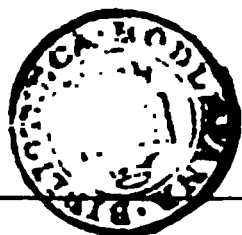
NOTE.—An unmarried man may, without violating any rule of law, provide by will for the maintenance of his illegitimate children (*Dunlap v. Robinson*, 28 Ala. 100; *Harten v. Gibson*, 4 Desauss. 139; *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Williams v. MacDougall*, 39 Cal. 80); and, if legitimated by statute, a bastard may take under a bequest to "children" (*Shelton v. Wright*, 25 Ga. 636; *McGunnigle v. McKee*, 77 Pa. St. 81, but see *Thompson v. McDonald*, 2 Dev. & Bat. Eq. 463), or, one to "nephews" (*Brower v. Bowers*, 1 Abb. Dec. 214).

In *Standen v. Standen*, 2 Ves. 589, a devise to C. M. and C. E., legitimate son and daughter of C. S., was held good, although both C. M. and C. E. were illegitimate.

In *Rivers's Case*, 1 Atk. 410, a testator gave an equal share of his real estate to each of his two sons, J. and C. Both J. and C. were illegitimate.—Held, that they both took.

In *Wilkinson v. Adam*, 1 Ves. & Bea. 422, 12 Price 470, a residuary devise by a married man who had no legitimate children, "to the children which I may have by A., and living at my decease," was held, after their reputation as children of the testator had been shown by evidence, to vest the lands devised in them, as a class. [This case has been questioned. *Warner v. Warner*, 15 Jur. 141.]

In *Cartwright v. Vawdry*, 5 Ves. 530, a trust until testator's child or children should attain twenty-one or marriage, and then to pay such of them as became of age or married one-fourth of the whole income, there being one illegitimate child born before testator's marriage and three legitimates born afterwards,—Held, not to entitle such natural child to one-fourth.



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decease, my executor hereinafter named shall take charge and control of all my personal and real estate, wherever the same may be, and shall sell and dispose of the same as he may think to the best interest and advantage of all the parties hereby interested in the same.

"Second—I do hereby give, devise and bequeath unto my beloved wife, Jane Stewart, one-third of all my real estate, the same being the town of Paterson, in the state of New Jersey.

"Third—After deducting the said one-third devised and bequeathed to my beloved wife, I do order and direct that the rest, residue and remainder of the moneys derived from the sale of my said real estate be equally divided between the following persons: 1st, I do hereby give, devise and bequeath unto my friend Margaret Stewart an equal undivided one-fifth part of the profits obtained on the sale of my said real estate, together with all my personal property.

Fourth—I do hereby give, devise and bequeath unto my beloved son David Stewart, a minor, under the age of twenty-one years, to wit, now of the age of fifteen years, one equal undivided one-fifth part of the profits and moneys obtained on the sale of my said real estate.

Fifth—I do hereby give, devise and bequeath unto my beloved son Alexander Stewart, a minor, under the age of twenty-one years, to wit, now of the age of four years, one equal undivided one-fifth part of the profits and moneys obtained on the sale of my said real estate.

In *Bentley v. Blizzard*, 4 Jur. (N. S.) 652, M. B. gave the whole of her estate to E. B., then living with her as her husband, for life, and afterwards to be equally divided between the natural children of the said E. B. who might then be living. There were then living with M. B. and E. B. two natural children which she had had by him.—*Held*, that in case they survived E. B., they were entitled.

In *Connor's Case*, 2 Jones & Lat. 456, a bequest was made to pay to N., during her life or until her marriage, for the support of her children, W. and R., and in case of her death or marriage to apply it to the use of her children. The testator was then cohabiting with A. and had had by her two illegitimate children, W. and R., named in his will, and no others. Subsequently he had four others.—*Held*, that W. and R. took to the exclusion of the others. Also, *Medworth v. Pope*, 2 Beav. 71.

In *Mortimer v. West*, 3 Russ. 370, a gift to A. and B., who were illegitimate children, and every other child or children of M. D., the mother of A. and B., "alive at my decease or born within nine months afterwards," share and share alike,—*Held*, not to include any born after the date of the will.

In *Dorin v. Dorin*, L. R. (7 H. of L.) 568, a man who had two illegitimate children by M. C., married her, and, the next day, by will, gave her "liberty to direct the disposal of the property among our children, by will, * * * and, should she make no will, I desire that the property shall be divided * * * equally between my children by her." He had no children born afterwards, but always treated the

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Sixth—I do hereby give, devise and bequeath unto my beloved son Joseph Stewart, a minor, under the age of twenty-one years, to wit, now of the age of two years, one equal undivided one-fifth part of the profits and moneys obtained on the sale of my said real estate. Said bequeaths being independent of the bequeath made to my said wife. **Seventh**—I do hereby order and direct that the money derived of and from the sale of my said real estate shall be paid over to such devisees as may be of age as soon after my death as may to my said executor seem proper, and that all moneys by him in hand, the results of the sale of my said real estate, shall be invested in United States securities to and for the interest and advantage of my said children herein named who may at the time of the sale of said property be minors. **Eighth**—I do hereby nominate, constitute and appoint my beloved brother Thomas Stewart, of the town of Paterson, state of New Jersey, to be the guardian of such of my said children as may be minors at the time of my decease, and also nominate, constitute and appoint the said Thomas Stewart to be the executor of this my last will and testament, hereby revoking all former wills by me made."

The bill states that the testator died August 24th, 1878, leaving his widow, Jane Stewart, and the following legitimate children, all by her: Mary A., James F. and David;

two already mentioned as his own children.—*Held*, that, aside from the widow's interest, the estate was undisposed of.

In *Worts v. Cubbitt*, 19 Beav. 421, a natural daughter, who, in a prior part of the will, had been mentioned by her christian name and so described as one of the daughters, was held to be included in a subsequent general gift "to all my daughters." Also, *Evans v. Davies*, 7 Hare 498; *Owen v. Bryant*, 2 DeG. M. & G. 697, 13 E. L. & E. 217; but see *Bagley v. Mollard*, 1 Russ. & Myl. 581.

In *Barnett v. Tugwell*, 31 Beav. 232, a residuary gift "to the children, legitimate or illegitimate, of my brother H. equally," was held good, and to be divided among three illegitimate and nine legitimate children of H., who survived testator.

In *Herbert's Trusts*, 1 Johns. & H. 121, a bequest was made in favor of the daughters of A., A. having died seven years before the date of the will, leaving no legitimate children, but two reputed daughters, who were known and recognized as such by the testator, and one of whom survived him.—*Held*, that such survivor was entitled.

In *Woodhouselee v. Dalrymple*, 2 Mer. 419, a gift "to the children of C. K., living at my decease," such children being illegitimate but recognized by C. K. as his children, and C. K. dead at the time of testator's death, carried the property to them.

In *Fraser v. Pigott*, 1 You. 354, a bequest was made among testator's grandchildren, being children of his late sons, W. and J., whether born in wedlock or not. J. left both legitimate and illegitimate children, W. left only illegitimates.—*Held*, that only the legitimate children of

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and that he left, also, the following children, reputed to be his illegitimate children by one Margaret Stewart, viz.: Alexander Stewart, aged six years, and Joseph Stewart, aged three years or thereabouts.

The bill presents the following questions: First—Whether the testator intended that his executor should sell all of his real and personal estate, or whether, as to his real estate, he intended that one-third of it should just be set off to his widow as her dower, or his devise to her, and only the remainder thereof be sold. Second—Whether Margaret Stewart takes, under the will, one-fifth of the proceeds of the sale of the whole, or of two-thirds only of the real estate, or one-fifth of the profits made by the sale thereof over its cost, or one-fourth thereof, and what share she does take. Third—Whether David, Alexander and Joseph Stewart, respectively, take, under the will, one-fourth or only one-fifth of the profits or moneys to be obtained by a sale of the real estate, and to what share they are respect-

J. could take, to the exclusion of J.'s illegitimates, and that the illegitimates of W. could also take. But see *James v. Smith*, 14 Sim. 216 *Overhill's Trusts*, 1 Sm. & Giff. 362.

In *Meredith v. Farr*, 2 Y. & C. Ch. 525, there was a bequest of one half of a sum to the children of A. and the other half to the children of B., the latter being specifically named. Both A. and B. had legitimate and also illegitimate children.—*Held*, that only the legitimate children of A. were entitled, but that all the children of B. were entitled because they were named in the will; and a bequest to the children of A., including her daughter E. (who was illegitimate) was good, A. having no legitimate child named E.

In *Allen v. Webster*, 2 Giff. 177, under a designation as "my grandson," a legitimate son of testator's illegitimate son was held entitled.

In *Gabb v. Prendergast*, 1 Kay & Johns. 439, a settlement was made on all the children, as well those already born as hereafter to be born, of A. and B. his wife. A. and B., at the date of the settlement, had been married five years. They never had any legitimate children, but before her marriage, B. had several children still living who were reputed to be her children by A.—*Held*, that such children were entitled.

In *Doe v. Beynon*, 12 Ad. & El. 431, a testator devised to M. B.'s three daughters, M., E. and A. When the will was made, M. B. had three legitimate daughters named M., E. and A., but E. died in testator's life-time (the fact of such death being concealed from him), and afterwards M. B. had an illegitimate daughter E.—*Held*, that E. was not entitled.

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vely entitled. Fourth—Whether the testator intended to dispose of all his real and personal estate, or whether he intended, after the devise to his wife, to devise only four undivided fifth parts thereof, and to die intestate as to the rest.

The defendants, Jane Stewart, Mary A. Baron (late Stewart) and her husband, Sarah J. Brooks (late Stewart) and her husband, James F. Stewart and his wife, and David Stewart, have answered. They admit all the material allegations of the bill, and submit the following additional questions: First—Whether the will is not so vague and uncertain that its judicial construction is impossible, and whether the will is not therefore void. Second—Whether the provisions of the will are not so confused and contradictory that the intention of the testator is not ascertainable, and whether the will is not therefore void. Third—Whether the testator intended that the executor should sell the real estate free from his widow's dower, and whether

In *Wells's Estate*, L. R. (6 Eq.) 599, a direction to pay certain shares to "all my children living at my decease, except my son T.," he being legitimate, and also another child A., was held not to include A.

Also, *Ayles's Trusts*, L. R. (1 Ch. Div.) 282

In *Holt v. Sindrey*, L. R. (7 Eq.) 170, under a trust for testator's daughter, the wife of J. L., for life, and then unto all and every the child or children of such daughter, begotten or to be begotten. The daughter was never legally married to J. L., but had several children by him, and had no legitimate children.—*Held*, a sufficient designation entitle them to take.

In *Savage v. Robertson*, L. R. (7 Eq.) 176, a gift to testator's unmarried daughter, by name, and to her two youngest daughters, entitles them to share with their mother.

In *Kerr's Trusts*, L. R. (4 Ch. Div.) 600, a fund was given upon trust for such of the children of M. as she should appoint. M. appointed her children E. and C., their executors &c., for their own use and benefit. E. was an illegitimate and C. a legitimate child.—*Held*, that the appointment to E. was void.

In *Lepine v. Bean*, L. R. (10 Eq.) 160, under a residuary bequest to the children of M., an illegitimate child of the testator and M. may take, he having no other children living, although he had another wife besides M. Also, *Dilley v. Matthews*, 11 Jur. (N. S.) 425.

In *Clifton v. Goodbun*, L. R. (6 Eq.) 278, a testatrix, who was never married, describing herself as a spinster, bequeathed her property in trust for her children, and, in a codicil, she described them by name.—*Held*, that all of her illegitimate children living at her death, and

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the widow is not entitled to her dower besides the third of the proceeds of the real estate.

The intention of the testator, though somewhat obscurely expressed, can be discerned in the provisions of this will. It must be an extreme case in which the court will hold a will void for uncertainty. *Den v. McMurtrie*, 3 Gr. 276.

"In the construction of wills," says Mr. Jarman, "the most unbounded indulgence has been shown to the ignorance, unskilfulness and negligence of testators. No degree of technical informality, or of grammatical or orthographical error, nor the most perplexing confusion in the collocation of words or sentences, will deter the judicial expositor from diligently entering upon the task of eliciting from the contents of the instrument the intention of its author, the faintest traces of which will be sought out from every part of the will, and the whole carefully weighed together." 1 Jarm. on Wills 315. Said Sir John Leach, V. C., in *Mason v.*

including one born after the will was made, were entitled to her property.

In *Lakes v. Hordem*, L. R. (1 Ch. Div.) 644, residuary personal estate bequeathed to "all and every my daughters, in equal shares, who shall attain the age of twenty-one years, or marry,"—Held, that as testator had no legitimate children, his three daughters were intended.

In *Hill v. Crook*, L. R. (3 Ch. Div.) 773, (6 H. of L.) 265, a trust to stand possessed (after the death of M., the wife of J. C., without appointment) for the child or children of M. C., was held good, although the marriage of J. C. and M. was not lawful, their children, however, being alive and recognized as such by testator.

In *Paul v. Children*, L. R. (12 Eq.) 16, a trust in favor of testator's niece C. and her husband, and for her child, if only one, or all her children if more than one. C. being then fifty years old, and having only one child, born before her marriage, such child was held not entitled. See *Overhill's Trusts*, 1 Sm. & G. 362.

In *Durrant v. Friend*, 11 E. L. & E. 2, A., in 1847, gave to his adopted daughter E. the residue of his estate, "the interest to be paid to her until her first-born son should attain the age of twenty-one." E. had an illegitimate son, born in 1844, who was maintained at the expense of testator.—Held, that such son was not entitled. Also, *Godfrey v. Davis*, 6 Ves. 43; *Ward v. Espy*, 6 Humph. 447; *Miles v. Boyden*, 3 Pick. 213.

In *Gill v. Shelley*, 2 Russ. & Myl. 336, a share was given to the children of M., deceased. M. left two children, one legitimate the other not. Evidence was admitted to prove that the illegitimate had acquired the reputation of being the child of M.; that the testatrix well knew it, and that M. left only those two children.

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Robinson, 2 Sim. & Stu. 295, "In order to avoid a will for uncertainty, it must be incapable of any clear meaning."

The testator meant to give his executor power to sell all his property, real and personal, as the latter might deem most advantageous to the beneficiaries under the will. He did not intend to except from sale any part of his real estate. By the gift of one-third of his real estate to his wife, he intended a gift of one-third of the proceeds of the sale of all his real estate, for the gift is not only immediately preceded by a direction to sell all his real estate, but is immediately succeeded by a gift of the residue of the proceeds, after deducting therefrom the third given to his wife, referring to the devise of the third of the real estate. Of the proceeds of the sale of his real and personal property, he meant to give all that would be derived from the personal property, after payment of his debts and funeral and testamentary expenses, to Margaret Stewart. Of the pro-

In *Leigh v. Byron, 1 Sm. & Giff. 486*, a gift equally among all the children of L., was held to embrace two illegitimate as well as the one legitimate child of L. Also, *Edmunds v. Fessey, 29 Beav. 233*; *Hartley v. Tribber, 16 Beav. 510*; *Swaine v. Kennerly, 1 Ves. & Bea. 469*; *Hart v. Durand, 3 Anst. 684*.

In *Ehringhaus v. Cartwright, 8 Ired. 39*, a devise "to my said son T. and my daughter P., who was also born before I married her mother," was held not to prevent the heirs of P. from proving that P. was legitimate, although T. was not. See *Johnson v. Johnson, 1 Desauss. 595*; *Pearson v. Pearson, 46 Cal. 609*; *Kenyon v. Ashbridge, 35 Pa. St. 157*; *Viall v. Smith, 6 R. I. 417*.

In *Bayley v. Snelham, 1 Sim. & Stu. 78*, J. S., who had married a sister of his deceased wife, and had one son of that marriage, gave the residue of his property to all of his children by his reputed wife.—*Held*, that the son, being born at the date of the will, was entitled.

In *Beachcroft v. Beachcroft, 1 Madd. 234*, under a bequest by an unmarried man "to my children," parol evidence was admitted to show whom the testator considered as his children, and they were admitted to take as a class, although illegitimate and not named specifically in the will.

In *Shearman v. Angel, Bail. Eq. 351*, a testator devised part of his estate to his "mother," for life, and, at her death, to her children, and devised another part to his "sister." The testator and his "sister" were illegitimate children of the "mother," who, at her death, left legitimate children surviving.—*Held*, that the latter took the first devise exclusively.

In *Gardner v. Heyer, 2 Paige 11*, a testator lived and cohabited with M. S., in his house, and had by her four natural children, a son called

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ceeds of the sale of his real estate, he intended that one third should go to his wife, and that the rest should be equally divided between Margaret Stewart, his legitimate son David, and his illegitimate sons Alexander and Joseph. That he did not intend to die intestate as to any part of his estate, is manifest. All his personal estate is given to Margaret Stewart, and he directs that all his real estate be sold, and, after giving to his wife one-third of the proceeds, he disposes of all the rest. Though in the gift of a share of the proceeds of the sale of the real estate to Margaret Stewart, he speaks only of "profits," giving to her an equal undivided fifth of the "profits obtained from the sale," while in the gifts to David, Alexander and Joseph, he gives to each of them a fifth of the "profits and moneys obtained from the sale," it is evident that he intended to give her the like share of the same fund with each of them. He appears to have used the word "profits" by mis-

John and three daughters who were baptized by his name and educated and acknowledged by him as his children. By his will, he gave to his son John \$10,000, and to each of his daughters \$3,000.—*Held*, sufficient description and designation of them to entitle them to take as legatees.

In *Williams v. MacDougall*, 39 Cal. 80, a testator devised all of his estate to his two legitimate daughters M. and F., subject to the education &c. of A., B. and C., "my hereinbefore-named minor children." A., B. and C. were illegitimate.—*Held*, that A., B. and C. were entitled to education &c. according to testator's situation in life.

In *Jackson v. Hartshorne*, 1 Code (N. Y.) Rep. 91, note, a testator having had several illegitimate children whom he recognized as his own, married their mother, and, she being pregnant, he devised his property to "the maintenance of my wife and such children that she may have had by her."—*Held*, that the children born before the marriage could not take.

In *Ferguson v. Mason*, 2 Sneed 618, a testator bequeathed a slave to his daughter E., for life, with remainder to his granddaughter H. He had an illegitimate granddaughter H., the daughter of E., and also a legitimate one, named H., daughter of his son.—*Held*, that the latter was entitled to the remainder.

In *Powers v. McEachron*, 7 Rich. (N. S.) 290, a testator desired that all of his estate should be kept together until his youngest living child should attain the age of twenty-one years, and then to be divided "among my wife and all my then living children equally." Testator married S. T., in 1813, and they separated in 1819, having had several children. In 1834, S. T. and her children removed from the state. In 1843 and subsequently, testator had natural children by S. C., who

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take, instead of "proceeds," or an equivalent term. That he meant to give her an equal share in the whole of the remainder of the proceeds of the sale of the real estate, after deducting one-third for his wife, is clear, for he provides that, after deducting the third given to his wife, the rest, residue and remainder of the moneys derived from the sale of his real estate, shall be equally divided among Margaret and his three sons above mentioned, referring to them as "the following persons," and proceeding to name them; and there is no indication of any contrary or different intention by any disposition of any part of the proceeds of the sale of the real estate in any other way. Again, there could be no equal division of all the rest, residue and remainder of the proceeds of the sale of his real estate among Margaret, David, Alexander and Joseph, if she was to receive a share of the profits only.

The testator intended to give to Margaret, David, Alex-

he acknowledged as his wife. His wife, S. T., died in 1857, and before that time his will was executed.—*Held*, that S. C. and her children were entitled.

Under a devise to B., for life, with remainder to her issue, an illegitimate daughter of B. cannot take (*Doggett v. Moseley*, 7 Jones (N. C.) 587; *Gibson v. Moulton*, 2 Disn. 158); so, under a devise to the lawful issue of a life tenant (*Black v. Cartmell*, 10 B. Mon. 188; see *Miller's Appeal*, 52 Pa. St. 113); so, under a bequest to the next of kin of J. (*Standley's Estate*, L. R. (5 Eq.) 303); so, to two illegitimate children and over if either die without heirs (*Pratt v. Flamer*, 5 Han. & Johns. 10).

Under a bequest to testator's widow "to be at her disposal in any way she may think best for the benefit of herself and family," a bequest to an illegitimate son of one of testator's sons is valid. *Lambe v. Eames*, L. R. (6 Ch. App.) 597.

The above cases do not touch the question as to the undoubted right of a state to authorize bastards to inherit. (*Stevenson v. Sullivant*, 5 Wheat. 207; *Miller v. Williams*, 66 Ill. 91; *Alexander v. Alexander*, 31 Ala. 241; *Drain v. Violett*, 2 Bush 155; *Allen v. Ramsey*, 1 Metc. (Ky.) 635; *Flintham v. Holder*, 1 Dev. Eq. 349; *Drake v. Drake*, 4 Dev. 110; *Wagoner v. Miller*, 4 Ired. 480; *Little v. Lake*, 8 Ohio 289; *Wright v. Lore*, 12 Ohio St. 619; *McCormick v. Cantrell*, 7 Yerg. 615; *Swanson v. Swanson*, 2 Swan 446; *Ash v. Way*, 2 Gratt. 203.) But such statutes cannot be retroactive. (*Hughes v. Decker*, 38 Me. 153; *McCool v. Smith*, 1 Black 459; *Edwards v. Gaulding*, 38 Miss. 118. See *Rice v. Efford*, 3 Hen. & Mun. 225, 228, note; *Brower v. Bowers*, 1 Abb. App. Dec. 214.) Nor legitimate bastards, so as to render them capable of inheriting lands in another state. (*Smith v. Derr*, 34 Pa. St. 126; *Lingen v. Lingen*, 45 Ala. 410;

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ander and Joseph, all the remaining two-thirds of the proceeds of the sale of all his real estate after deducting the third given to his widow, for he expressly says so. He, indeed, in particularizing the gifts, gives to each of them only a fifth instead of a fourth part, but that is evidently a mere arithmetical mistake.

The widow is not entitled to dower in addition to the gift of one-third of the proceeds of the sale of the real estate. A wife will be put to her election between a testamentary disposition in her favor and her dower, when it clearly appears from the will that the testamentary provision was intended as a substitute for the legal one; and the intention will be implied if the claim of dower would be clearly inconsistent with the will. *Stark v. Hunton*, Sax. 216; *Colgate's ex'rs v. Colgate*, 8 C. E. Gr. 372. In this case the testator disposes of all his estate. He not only provides for his widow, but gives her more than she would have been entitled to as her dower. He gives her absolutely one-third of the proceeds of the sale of all his real estate. He then

Doe v. Vardill, 5 Barn. & Cress. 438.) And are strictly construed. (*Pina v. Peck*, 31 Cal. 359; *Edwards v. Gaulding*, 38 Miss. 118; *Miller v. Stewart*, 8 Gill 129; *Barwick v. Miller*, 4 Desauss. 434. See *Remy v. Municipality*, 11 La. Ann. 148.)

That representation among collaterals shall extend to the children and grandchildren of brothers and sisters, includes illegitimate ones. *Houston v. Davidson*, 45 Ga. 574.

Whether, under the statute of distributions, an illegitimate child may take as a "brother" or "child." *Brown v. Dye*, 2 Root 280; *Porter v. Porter*, 7 How. (Miss.) 106; *Standley's Estate*, L. R. (5 Eq.) 303; *Hughes v. Decker*, 38 Me. 153; *Barwick v. Miller*, 4 Desauss. 434.

And also under the statute of descents. *Heath v. White*, 5 Conn. 228; *Dickinson's Appeal*, 42 Conn. 491; *White v. Ross*, 40 Ga. 339; *Blacks v. Milne*, 82 Ill. 505; *Berry v. Owens*, 5 Bush 452; *Burlington Fosby*, 6 Vt. 83; *Cooley v. Dewey*, 4 Pick. 93; *Haraden v. Larabee*, 13 Mass. 430; *Pratt v. Atwood*, 108 Mass. 40; *Jones v. Burden*, 4 Desauss. 439; *Rogers v. Weller*, 5 Biss. 166.

An illegitimate child is not entitled to a share of his father's estate if omitted from the will. *Kent v. Barker*, 2 Gray 535. See *Beck Metz*, 25 Mo. 70.

A testator cannot appoint a testamentary guardian for his illegitimate son. *Sleeman v. Wilson*, L. R. (13 Eq.) 36.

A penalty for abducting a daughter under sixteen, given to a father authorizes a recovery by the putative father of a bastard. *Rex v. Corforth*, 2 Str. 1162.—REP.

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gives to others all the rest of those proceeds. He clearly did not contemplate the sale of the real estate subject to her dower; and, if so, it must be held that the provision made for her was intended to be in lieu of her dower, and she must be put to her election. See *Colgate's ex'rs v. Colgate*, 8 C. E. Gr. 372, and *Savage v. Burnham*, 17 N. Y. 561.

In the brief of defendants' counsel, it is insisted that the gifts to the testator's sons Alexander and Joseph must fail, because it appears that those persons are illegitimate children of the testator. It is not apparent on what ground this claim is rested. A general bequest to a testator's "children" will indeed be held to refer to his legitimate children alone, but a bequest to his illegitimate child, by name, will undoubtedly be good. The gifts in the case under consideration are to the testator's sons Alexander Stewart and Joseph Stewart. He had no legitimate sons by those names, but had illegitimate ones.

JOSEPH S. STEIN

v.

WILLIAM SULLIVAN and wife and others.

The title of the assignee of a mortgage, whose assignment has been duly recorded, is not affected by a subsequent assignment of the same mortgage by his assignor, who had obtained possession thereof under pretence of collecting the interest on it, to a third party. The record of such assignment was notice to the latter.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. E. A. S. Man, for complainant.

Mr. J. H. Jackson, for answering defendant.

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THE CHANCELLOR.

This suit is brought to foreclose a mortgage for \$1,200 and interest, dated March 28th, 1874, and given by William Sullivan and his wife to John Leffler, by whom it was assigned, by assignment dated on the same day and duly recorded, to Peter Malloy, who, by his assignment dated April 15th, 1876, and recorded May 9th, 1876, assigned it to David M. Koehler as collateral security for any indebtedness he might, after the date of that assignment, contract with Koehler, of whom he proposed to purchase goods on credit. Koehler, by his deed of assignment, dated November 17th, 1878, assigned the mortgage to the complainant. After the assignment to Koehler, and before the assignment by the latter to the complainant, Peter Malloy became indebted to Koehler for goods sold and delivered to him, and, for part of the amount of the indebtedness, gave the latter his three notes, two of which were dated October 3d, 1876, one for \$224.40 and the other for \$224.00; the former payable at three, and the latter at six months. The other note was for \$269.76, was dated January 6th, 1877, and was payable at two months. These notes are wholly unpaid, and the amount of them, with interest from their maturity, is due to the complainant. The only answer to the cause is one put in by Michael Malloy, brother of Peter, who is now the owner of the mortgaged premises, having received the title from Sullivan by deed dated May 11th, 1877. He alleges that he purchased the mortgage in suit from Peter, for \$1,200, September 18th, 1876, without notice of the previous assignment by Peter to Koehler, and that Peter then, by assignment of that date, assigned the mortgage to him. It appears that Peter assigned to Koehler, at the same time when he assigned the mortgage in suit, another mortgage of \$600, made by one Hennessy, also as collateral security for the payment of future indebtedness. He represented that it was the first mortgage on the property. It proved to be in fact the third. Previously to the 2d of September, 1876, he took that mortgage and the bond

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which it purported to secure, from Koehler, to collect the interest for the latter. On the day last mentioned he returned them to Koehler and paid him the interest which he professed to have collected from Hennessy. He then asked Koehler to let him have the Sullivan bond and mortgage (that mortgage is the mortgage in suit) for the same purpose, to collect the interest thereon for Koehler. Koehler demurred on the ground that it was not necessary for Malloy to have the bond and mortgage for the purpose, but Malloy said it was, for Sullivan would not pay him unless he had them, and thereupon Koehler delivered the papers to him. Malloy swears that they were not delivered to him for that purpose at all, but were delivered up by Koehler to him because the latter had sufficient security in the \$600 mortgage for the indebtedness for which the mortgages were collateral security.

There is not only no corroboration of his testimony on this point, but it is explicitly contradicted by Koehler and also by Sigmund D. Gantz, who was present, and who fully corroborates Koehler. According to the clear weight of evidence Peter Malloy obtained the bond and mortgage from Koehler on pretence of collecting the interest, and then assigned them to his brother Michael as his own property, as they say. Michael testifies that, before taking the assignment, he went to the clerk's office and employed a person there to search the records, and on being informed by him that "it was all right, that everything was clear," he took the assignment, which was drawn, executed and acknowledged there. But at that time the assignment from Leffler, the mortgagee, to Peter Malloy, and the assignment from the latter to Koehler, were on record. The former was recorded March 20th, 1874, and the latter May 9th, 1876. The record was notice to Michael of Koehler's title to the bond and mortgage. The "act concerning mortgages" (*Rev. p. 708 § 32*) provides for the recording of assignments of mortgages of land, and that the record shall be notice, from the time the assignment is left in the office

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for record, to all persons concerned, that the mortgage assigned according to the assignment. Michael therefore had notice, when he took the assignment, that Koehler was the owner of the mortgage by assignment. But it is urged that the mortgage was assignable by mere delivery, without writing, and therefore Michael might assume that Peter was the owner of it from his possession and claim of ownership. It is difficult to see what protection the act just referred to would afford if, notwithstanding its provision on the mere fact that a person has the mortgage in his possession and fraudulently claims to own it, is sufficient to give to one who buys it from him a valid title as against the real owner, whose title to it is on record. The law imposes upon Michael the duty of examining the records, to ascertain whether Peter was the owner of the mortgage, and Koehler was protected in his ownership of the mortgage by the record of his assignment.

Michael holds the equity of redemption. There is therefore no necessity for providing for the right which he would have had under his assignment if he were not the owner of the equity. In that case he would have been entitled to the benefit of the mortgage after paying the complainant's claim and costs.

The title of the complainant to the mortgage was attacked on the hearing on the ground that he is not a *bona fide* assignee of the mortgage for value, but holds it by an assignment merely voluntary. It appears by Koehler's testimony that the complainant gave value for the mortgage. But if he had given nothing for it, that fact would not affect his title in this suit.

There will be a decree for the complainant.

Lang v. Moole.

DORA M. LANG and husband

v.

PETER MOOLE and wife.

A contract for the sale of lands provided that, of the purchase-money, \$100 should be paid in cash at the time when the agreement was made, and the remaining \$600 in monthly installments of \$10 each, no stipulation as to interest being inserted. The vendee entered and continued in possession at the time of filing his bill for specific performance.—*Held*, that he should pay interest on the installments as they came due.

Bill for specific performance. On final hearing on pleadings and proof.

Mr. T. F. McCormick, for complainants.

Mr. P. H. Gilhooly, for defendants.

THE CHANCELLOR.

The suit is brought to rectify a defect in the description of the property in an agreement made March 29th, 1873, by the defendants with Mary Jane Dexter (whose assignee the complainant, Mrs. Lang, is), for the sale and conveyance by the defendants to her, for the price of \$700, of a house and lot in the city of Elizabeth, in this state, and to compel specific performance of the contract. By the agreement, \$100 of the purchase-money was to be paid on the making of the agreement, and the balance (\$600) in equal monthly installments of \$10 each, and the seller was to convey the property on receiving payment as therein stipulated. The mistake in the description of the property is admitted. The sole question presented is whether the \$600 of purchase-money paid in installments running through a period of five years, bears interest.

The defendants, by their answer and testimony, allege that in the instructions to the scrivener by whom the agreement

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was drawn, he was directed to make provision in the instrument for interest on that money. Neither Mrs. Dexter nor her husband is called, however, to testify on the subject, and the scrivener appears to have no recollection on the point. It appears that two payments of interest (\$21 each) were made, one by Dexter, and the other by his wife; but in August, 1874, he declared that he would pay no more interest, unless compelled by law. In equity, the vendor under such an agreement as that upon which this suit is brought, is the owner of the purchase-money, and the vendee is the owner of the land; and in general, the latter is entitled to an account of the rents and profits, and the former is entitled to interest. Where the purchaser is in possession, equity will in general require him to pay interest on the unpaid purchase-money. The parties may, indeed, control the matter by their stipulations, but so strongly does equity hold to the principle that a purchaser in possession shall pay interest, that it will look at any agreement which appears to prevent the application of the rule, in the light of the general principle, and since it interposes only according to conscience, will refuse to compel execution of it where it grossly violates the rule. *Fry on Spec. Perf.* § 921; *Birch v. Joy*, 3 H. of L. 598. In the case in hand, the rule is clearly applicable. The purchaser and her assignee have had possession of the property, as is stated in the bill, ever since the making of the agreement. The contract provided that the title shall pass when the whole of the purchase money shall have been paid. It does not provide for possession by the purchaser in the meantime. The rule, therefore, is undeniably applicable, and the seller is entitled to interest. Inasmuch as none has been paid, except \$42, Lang has not paid all that she is bound to pay, and consequently the complainants are not entitled to a decree of specific performance. There appears to have been no necessity for filing a bill for rectification of the agreement in matter of description. The complainants were in possession of the property under the agreement, and the defe

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ever refused to correct the agreement. No application appears to have been made to them on the subject. The agreement describes the property as "a certain house, one story high, and the lot of ground upon which the same is erected." As between the parties, it could have been enforced without rectification. *Lewis's adm'r v. Reichy*, 12 *E. Gr.* 240; *Owen v. Thomas*, 3 *Myl. & K.* 353. As to strangers, the vendee had possession under the agreement (which was on record), and that was notice of her claim. *Mugd. on Vend.* (11th Am. ed.) 543; *Daniels v. Davison*, 16 *S.* 254; *Baldwin v. Johnson*, *Sax.* 441; *Havens v. Bliss*, 11 *E. Gr.* 363. There will be a decree rectifying the description, but the complainants will, under the circumstances, be required to pay the costs of the suit.

HULDAH HOLMES

v.

WILLIAM H. ABRAHAMS and others.

Where the mortgaged premises were described as containing one hundred acres of land, another tract of nine acres, the title to which was derived from another source, cannot be claimed as covered by such mortgage, although the description in the mortgage concluded with a general reference to a deed which conveyed both tracts.

Bill to rectify and foreclose mortgage. On final hearing on pleadings and proofs.

Mr. A. C. Hartshorne, for complainant.

Mr. J. G. Trusdell, for answering defendants.

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THE CHANCELLOR.

The bill is filed to rectify the description of the mortgaged premises (property in Monmouth county), so as to exclude therefrom a certain tract of about twenty-eight acres, called the Machett's mills property, and the right, title and interest of a turnpike company in another tract, and to include a lot of about nine acres; and it prays a foreclosure and sale of the premises when the rectification shall have been made. The mortgage was given by William H. Abrahams and his mother, Jane Abrahams, now deceased, to Hendrick P. Conover, also deceased, on or about the 1st day of April, 1868, to secure the payment of \$2,500 with interest. The ground on which the rectification is claimed, is mutual mistake of the parties. But there is no evidence whatever that there was any mistake, except as it is to be presumed that the parties did not intend to cover, by the mortgage, land which long previously had notoriously been sold and conveyed away.

There is no proof whatever that they intended to embrace the tract of nine acres in the mortgage; but, on the other hand, all the proof on the subject is directly to the contrary. The mortgagor, William H. Abrahams, derived his title to the mortgaged premises by descent from his father and a deed of conveyance made to him by his sisters and the husbands of those of them who were married, by which they conveyed their respective interests in the property to him. His mother joined in the mortgage, because she had a right of dower in the property. The description of the premises in the deed to William H. Abrahams, just mentioned, is the same as that in the complainant's mortgage; and the complainant endeavors to show that, by mutual mistake of the parties, the tract of nine acres was omitted from the deed as well as from the mortgage; but she has wholly failed in her effort. The proof is, that the grantors in that deed did not intend or agree to convey, nor did the grantee buy, nor did he expect to receive by that deed, any

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interest in that lot. When the mortgage was made, William H. Abrahams had no title to the lot of nine acres, except for an undivided one-seventh part, which he had inherited.

The premises are particularly described in the deed and mortgage, and the particular description is followed by a statement that they are the same premises conveyed by Daniel Gordon and wife to James Abrahams, by deed dated May 1st, 1805, and are also the same which were subsequently conveyed by James Abrahams and wife to James Abrahams Jr., by deed, in which last-mentioned deed (it is added) the description is different. The last-mentioned deed conveys the tract of nine acres as well as the tract particularly described in the mortgage. The tract of nine acres was conveyed to James Abrahams Sr., by Jonathan Pease. There is nothing in the reference to the deed from James Abrahams Sr. to his son James, to indicate an intention to convey or mortgage all the property conveyed by that deed. The statement of reference is merely that the property described is the same conveyed by David Gordon's deed, and the same conveyed, though by a different description, by the Abrahams deed. In the deed from Gordon, the property is said to contain one hundred acres, and it is described in the deed to William H. Abrahams and the mortgage, by the same description, including the statement of contents. The prayer for rectification must be denied as to the tract of nine acres. As to the Machett's mills property, and the right, title and interest of the turnpike company, there does not appear to have existed any question, at any time, that they should have been excepted. They were inadvertently included through the use of the description in the old deed. It does not seem to have been necessary to institute special litigation to rectify the mortgage in order to except them. A statement in the bill to foreclose that they ought not to have been included in the mortgage, would have brought the matter properly before

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the court. The complainant is not entitled to costs, against the mortgaged premises, of so much of the cause relates to the rectification; and, as to that part of the cause the answering defendants are entitled to costs.

ISAAC S. STOVER and others, administrators,

v.

MARY B. WOOD and others

A condition in a decree of the court of appeals, that complainants should bring suit within six months after the entry of such decree,—*Held*, to have been fulfilled where a suit was in fact instituted by them before the entry of such decree, and duly proceeded in afterwards, and, the bill therein having been dismissed on demurrer, another suit for the same object was, without unreasonable delay, begun and prosecuted.

Bill to foreclose. On demurrer.

Mr. E. W. Evans and Mr. James Wilson, for complainants.

Mr. J. N. Voorhees and Mr. John T. Bird, contra.

THE CHANCELLOR.

The demurrer is based on the ground that this suit was not commenced within the time limited for the purpose in *Stover's adm'rs v. Wood*, 1 Stew. 248, which was six months from the date (March 18th, 1877) of the decree of the court of errors and appeals. It appears, by the bill, that a suit for foreclosure of the mortgages was instituted before the entry of that decree, but on demurrer the bill was dismissed. The demurrer was special. On the hearing of ~~the~~ the statements of the bill were found to be insufficient, and the demurrer was therefore sustained and the bill dismissed.

Stover v. Wood.

Stover v. Reading, 2 Stew. 152. The bill was dismissed on the 18th of March, 1878. The bill in this suit was filed September 17th, 1878. It is urged on behalf of the demurrants, that this is not the same suit, and that the bill does not aver that it is. The complainants were, by the decree of the court of errors and appeals, put upon terms to bring suit to foreclose their mortgages within a limited period. But inasmuch as they had already begun suit, the terms were inapplicable, unless their bill in that suit should be dismissed within the period on their own motion. The object of imposing the condition was to compel them to use reasonable diligence in instituting proceedings for foreclosure, and so protect those who were interested in the mortgaged premises, but were not parties to the suit to set aside the cancellation, and were not bound by the decree therein, against the injurious consequences which might arise from delay on the part of the complainants in beginning suit to enforce their mortgage claims against them. It appears, by the bill in this suit, that the former bill to foreclose was dismissed, but it does not appear for what reason, though it does appear that it was on demurrer. It was dismissed a year after the entry of the decree of the court of errors and appeals. It is not, it is true, averred that this is the same suit, nor could such an averment have been made without manifest absurdity. But it sufficiently appears by the bill that this suit is a sequence of that, and has the self-same object. Certainty to a common intent, is all that is ordinarily required in pleadings in equity. The complainants might have asked leave to amend the bill in the former suit, and it would have been granted on such terms as seemed just; more especially if it appeared to be necessary that that course should be taken to save their right to sue. They adopted another method—that of filing a new bill. It appears, by the bill, that they are not barred by the condition; for it avers that their suit was already begun when the decree of the court of errors and appeals was entered. It appears, also, that they did not voluntarily dismiss their bill. The demurrer will be overruled.

Vosper v. Kramer.

JOHN VOSPER

v.

JOHN KRAMER and others.

A partner, for a valuable consideration, sold to his copartner all the effects of the firm, the latter also assuming its liabilities and agreeing to indemnify the former against them. The copartner afterwards made an assignment for the benefit of his creditors, under which the assignee sold some of the firm assets, as alleged, fraudulently. Subsequently a judgment for a partnership debt was recovered against both partners.—*Held*,

(1) That the partner, by his sale, had lost all equitable lien on the partnership assets, or right to follow the proceeds of sale arising therefrom, to apply them in satisfaction of the judgment.

(2) That he was not in a position to question the *bona fides* of the assignment.

Bill for relief. On general demurrer.

Mr. George Berdine, for the demurrants.

Mr. S. D. Grimstead, for complainant.

THE CHANCELLOR.

The case made by the bill is that the complainant and John Kramer were partners in trade in the city of New Brunswick; that on the dissolution of the copartnership, October 1st, 1877, the former sold his interest in the partnership assets to the latter, in consideration of \$150 and the assumption by the latter of the payment of the partnership debts and his agreement to indemnify the complainant against them; that Kramer took the interest on those terms; that the partnership property was sufficient to pay all the partnership debts; that on or about October 18th, 1878, Kramer made an assignment to the defendant Berdine, for the benefit of his creditors; that Berdine sold some of the partnership assets, under the assignment, to

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Henry Kramer, brother of John, who had full notice of the terms on which John Kramer obtained the complainant's interest therein; that the assignee realized from the sale a considerable sum of money, which he holds; that both the assignment and sale were fraudulent, and designed to defraud the complainant, and that a partnership debt specified in the bill being unpaid, and the complainant and John Kramer having been sued thereon, judgment has been recovered thereon against them, and the complainant is liable to be compelled to pay it.

The question is, whether the complainant can, for the payment of that debt, follow the goods in the hands of the purchaser, or the proceeds of the sale thereof in the hands of the assignee. The complainant claims that, under the circumstances, he is entitled to a lien in equity upon the property or proceeds of sale thereof, for the payment of the debt.

The claim is based merely on the ground that in equity a partner has a lien on the partnership assets for the payment of the partnership debts, and the partnership property cannot be applied to the payment of the individual creditors of the partners until after the partnership debts are paid.

This lien may be lost by the unqualified sale and transfer by the partner of his interest in the property to his copartner, whereby the property before held by them jointly becomes the several property of the latter. *Story on Partn.* § 358; *Gow on Partn.* 238. In this case, the complainant, in good faith, sold his interest in the assets to his copartner, for the consideration of \$150 and the assumption by the latter of the partnership debts and his agreement to indemnify the complainant against them. He reserved no lien. He is entitled to no relief against the property or the proceeds of the sale of it. *Langmead's Trusts*, 7 DeG. M. & G. 353; *Andrews v. Mann*, 31 Miss. 322. It is urged that the bill not only states that Henry Kramer, the purchaser, had notice that the agreement to pay the partner-

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ship debts formed part of the consideration of the transaction by the complainant, but it states, also, that the assignment to Berdine, and the purchase by Henry Kramer under were made fraudulently, and with the intent and purpose to delay, hinder and defraud the complainant; and that the deed of assignment and sale were voluntary and without consideration, and were contrived and carried out by John and Henry Kramer, acting fraudulently and in collusion, and in pursuance of an unlawful and fraudulent undertaking and agreement between them as a pretence and to defraud the complainant. But the complainant has no standing to enable him to question the *bona fides* of the assignment and sale under it. The demurrer will be allowed.

 DOLLY B. BROWN and others

v.

GEORGE FRANCIS BROWN and others.

Where legacies were, by one section of a will, charged on lands, and a full power is thereby given to the executors to sell testator's lands in order to pay debts and legacies,—*Held*, that such power was not qualified by a power given to the executors, in another section of the will, to sell after the death or remarriage of testator's widow.

Bill for construction of will. On bill and answer.

Mr. James O. Clark, for complainants.

Mr. Edward A. Day, for defendants.

THE CHANCELLOR.

Joshua Brown, late of Westfield, in the county of Union in this state, by his will, dated June 25th, 1875, after pr

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viding that his just debts and funeral expenses should be paid out of his estate as soon as practicable, gave to his sister Mary Ann Leverett, \$1,000; to his sister Sarah Moulton, \$900; to the Westfield Baptist church, \$500; to his sons George F., Joshua W., Charles B. and Edward N., \$2,000 each; to his daughter Anna Louisa, his piano-forte and \$2,000; to his wife, all of his household furniture and articles of taste, personal effects and property of every kind which, at his death, might be used upon or appertain to his homestead. He then, by the eighth section, empowered and directed his executors to sell any and all of his real and personal estate, except the building No. 302 Canal street, in the city of New York, and that which was specifically bequeathed, at public or private sale, for cash, or partly for cash and partly on credit, for the best price they could obtain for the same, and directed that, after the payment of his debts and the expenses of his estate, they pay each of the before-mentioned legacies to the parties entitled thereto, at the expiration of six months from the probate of his will; provided that, in the opinion of his executors, the interest of his estate should not be thereby jeopardized, but, should it be deemed by them improper to so pay the legacies, he directed that they be paid within thirty days after the settlement of the first account rendered by his executors; the legacies to be paid without interest. He then directed that, in case his sons George F., Joshua W. and Charles B., or either of them, should desire to carry on a business similar to that which he, at the time of making the will, was carrying on in the city of New York, his executors should offer to them the stock, books and fixtures in his store in New York, at the time of his death, at five per cent. below the actual, appraised value, and permit them to use the legacies given to them, in payment. He then devised all the rest and residue of his estate, real and personal, to his executors, or such of them as should qualify; as to his personal estate, to keep it invested according to law; and, as to his real estate, to demise and let it upon such terms, and for such periods, as

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they might see fit, and, after paying all expenses, including taxes and assessments, ordinary and extraordinary repairs, premiums on insurance &c., for the protection and improvement of his real estate, to apply the income derived from the said personal and real estate to the use of his wife, the complainant Dolly B. Brown, during her life, or so long as she should remain his widow and unmarried. And upon her death or remarriage, to the use of his children, share and share alike, during the minority of the youngest of them who should attain to the age of twenty-one years, and when that child should have attained its majority, to sell the real and personal estate and divide it in equal shares among his children. And he declared that the provisions in his will for his wife were intended to be in lieu and satisfaction of her dower. He then gave to his executors, or such of them as should qualify, power to sell any of his real estate, after the death or remarriage of his wife, and power to let or demise it, as in their judgment might seem proper; and, in case of need, to mortgage it; to rebuild in case of fire, and to make such alterations and repairs from time to time as to them may seem meet and proper. The personal estate of the testator has been applied to the payment of his debts and legacies, and has been sufficient for the purpose, except as to the legacy of Edward N. Brown, which remains unpaid, and of which the residue of the personal estate in the hands of the executors will only pay part. The executors being in doubt as to whether, under the provisions of the will, they have power to sell any of the real estate before the death or remarriage of the widow, to raise money to pay that legacy, the question is submitted to the court.

By the eighth section of the will the testator empowers and directs his executors to sell any and all of his real and personal estate, except the building No. 802 Canal street, in the city of New York, and that which is specifically bequeathed, and directs that they pay, after payment of his debts and the expenses of the estate, the legacies to the parties entitled thereto, fixing the time for the payment at the expiration

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six months from the probate of the will, and providing that, in case in the opinion of the executors the interest of the estate would be prejudiced by paying the legacies so early, they should pay them at a later day, but within thirty days after the settlement of their first account. By the tenth section, he gives to his executors power to sell the residue of his real and personal estate, with a view to a division of the proceeds thereof among his children, and by the twelfth he gives them power to sell any of his real estate after the death or remarriage of his wife, with power to let, demise or mortgage it, to rebuild in case of fire, and to make alterations and repairs, and the question which has arisen as to the power of the executors to sell, springs from the provision in the twelfth section which authorizes sale, but only after the death or remarriage of the widow. It is entirely clear that, under the eighth section, the executors have power to sell so much of the real estate, except the property in Canal street, as may be necessary to raise the money to pay the legacy to Edward N. Brown. By that section the pecuniary legacies are charged on the real estate, which the executors are thereby authorized to sell. The direction is to sell the property, and, after payment of the debts and expenses of the estate, to pay the legacies. This is a charge of the legacies on the land.

But further, by the tenth section all the rest and residue of the estate, real and personal, is given to the executors for the purposes therein mentioned, that is to say, for the use of the widow, and, after her death or remarriage, to the use of the testator's children during the minority of the youngest who shall attain to the age of twenty-one years, and, after such child shall have attained majority, to sell the property and divide the proceeds among the children or their legal representatives. The gift of the rest and residue of the real and personal estate together, after the gift of the pecuniary legacies, is evidence of the intention to charge the legacies on the land. In *Corwine v. Corwine*, 9 C. E. Gr. 579, where a testator, having first directed that his debts be

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the legacies to each of his daughters, and the household goods to them and his son, and upon the rest and residue of his estate, not otherwise disposed of, it was his will that the legacies were a charge upon his real estate, that if legacies are given generally, the real and personal estate is afterwards, the legacies are a charge upon the real as well as the personal estate. It is therefore that the legacies are charged upon the real estate, by the eighth section of the will, the executor is directed to sell. Under the provisions of that section, it is incumbent on the executors to sell so much of the real estate as may be necessary to make up the deficiency of the personal estate in paying the debts and legacies. In the absence of the express direction to sell to pay the debts and legacies, the power to sell would be implied. They are charged on the land. They are to be paid by the executors. A time is fixed in the will for the payment of the legacies by them. The power to sell would be implied. *Dewey's ex'rs v. Ruggles*, 10 C. E. Gr. 35; *Whitchhead v. Wilson*, 2 Stew. 396; *Haggerty v. Lanterman*, 1 Nev. 37.

The executors are to sell no more of the real estate directed to be sold in the eighth section than may be necessary to raise the deficiency, but they are, of course, to act with discretion, and to sell in such manner as will be most advantageous to the estate. If it be necessary to sell a house and lot to raise the money, they will do so. They may sell at public or private sale. The surplus proceeds of the sale will be part of the residuary estate. The real estate which it may not be necessary to sell to raise the deficiency will be held under the provisions of the will in regard to the residuary estate.

Miller v. Sandford.

HENRY H. MILLER, administrator &c.,

v.

DAVID P. SANDFORD and others.

A legacy charged on residuary realty and personalty was given to executors in trust, to pay the income to testator's son for life, and after his death to divide the principal among the son's children. There was not sufficient personalty, after paying debts, to pay the legacy in full.—*Held*,

(1) That sufficient real estate must be sold to raise the amount of the legacy.

(2) That the son, being an adult, was entitled to interest thereon only from one year after testator's death.

(3) That interest was payable on the whole amount of the legacy, although only a part of it had been realized.

Bill for construction of will. On final hearing on bill and answer.

Mr. J. Frank Fort, for complainant.

Mr. C. Borcheling Jr., for David P. Sandford.

THE CHANCELLOR.

Peter Sandford, late of the city of Newark, deceased, by his will dated November 1st, 1873, after ordering and directing payment of all his just debts and funeral expenses, gave to his executors the sum of \$20,000 in trust, to invest it and keep it invested on first mortgages, with bonds, and to pay the interest and income thereof, half-yearly, to his son David P. Sandford for life, and at his death the principal to his children (or their lawful representatives), in equal shares, on their respectively attaining to the age of twenty-one years; the interest in the meantime, between David's death and the majority of the children, to go to the use of the latter. He then gave and devised to his sister-

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in-law for life, the use and income of a house in Newa and then gave, devised and bequeathed to his wife, for life the use, interest and income of all the rest, residue and remainder of his estate, real and personal, and gave such rest, residue and remainder at her death to his executor in trust, to invest it and pay the interest and income and rents and profits to his daughter for life, and at her death to divide the property between her children (or their law representatives), in equal shares, in the same manner directed in the case of David's children. He then ordered and directed his executors and the survivor of them, to sell and convey in fee-simple the whole or any part of his real estate (except the property the use whereof he had given to his sister-in-law for life), when in their judgment should seem for the best interest of his estate so to do. The bill states that there will not be sufficient personal estate, after the payment of debts, to pay the legacy of \$20,000 in full; that David demands that the deficiency be made out of the testator's real estate; that he demands interest on the whole \$20,000, notwithstanding the fact that the whole amount has not yet been raised, and that he demands, also, that such interest be paid from the time of the testator's death. The complainant seeks the instruction of this court in the premises.

The legacy of \$20,000 is charged on the residuary real estate, and that real estate is to be sold, so far as necessary to raise the deficiency. The legacy is given generally, and the residuary real and personal estate are subsequently given in a mass. Under such circumstances the legacy is a charge on the residuary real estate, as well as on the personal estate. *Corwine v. Corwine*, 9 C. E. Gr. 579. The fact that an interest in land was given before the gift of residuum, makes no difference. *Bench v. Biles*, 4 Ma 187; *Hawkins on Wills* 295; *Theobald on Wills* 45; *Poulson v. Johnson*, 2 Stew. 529. The legacy bears interest from the end of one year from the death of the testator. *Hoagland v. Schenck*, 1 Harr. 370. The rule which allc

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interest for support, on a legacy to a child, from the death of the testator, does not apply to adults. *Ibid.*; *Hennion's ex'r v. Jacobus*, 12 C. E. Gr. 28; *Howard v. Francis*, 3 Stew. 444. The interest is payable on the whole sum of \$20,000, although only part of it has as yet been realized. *Hoagland v. Schenck*, 1 Harr. 370.

DAVID S. YOUNG and wife

v.

SYLVESTER HILL and wife and others.

Lands were conveyed to a mortgagee in consideration of his cancelling a mortgage thereon given by the grantor and his wife. They fraudulently concealed the existence of a judgment obtained against them by collusion, and levied on the premises the day before the transfer.—*Held*, that the cancellation should be set aside, and the lien of the mortgage re-imposed on the lands, and that the judgment creditor be restrained from selling the premises except subject to the mortgage.

Bill for relief. On final hearing on pleadings and proofs.

Mr. H. C. Pitney, for complainants.

Mr. W. W. Cutler, for defendants.

THE CHANCELLOR.

The bill is filed for relief, under the following circumstances. The complainant, David S. Young, was, in April, 1877, the owner of a farm in Morris county. He then exchanged that property with the defendant, Catharine E. Hill, for land in Morristown belonging to her, and which appears to have been heavily mortgaged, and \$3,000 secured by the bond of her and her husband, and their mortgage

Vosper v. Kramer.

JOHN VOSPER

v.

JOHN KRAMER and others.

A partner, for a valuable consideration, sold to his copartner all the effects of the firm, the latter also assuming its liabilities and agreeing to indemnify the former against them. The copartner afterwards made an assignment for the benefit of his creditors, under which the assignee sold some of the firm assets, as alleged, fraudulently. Subsequently a judgment for a partnership debt was recovered against both partners.—*Held*,

(1) That the partner, by his sale, had lost all equitable lien on the partnership assets, or right to follow the proceeds of sale arising therefrom, to apply them in satisfaction of the judgment.

(2) That he was not in a position to question the *bona fides* of the assignment.

Bill for relief. On general demurrer.

Mr. George Berdine, for the demurrants.

Mr. S. D. Grimstead, for complainant.

THE CHANCELLOR.

The case made by the bill is that the complainant and John Kramer were partners in trade in the city of New Brunswick; that on the dissolution of the copartnership, October 1st, 1877, the former sold his interest in the partnership assets to the latter, in consideration of \$150 and the assumption by the latter of the payment of the partnership debts and his agreement to indemnify the complainant against them; that Kramer took the interest on those terms; that the partnership property was sufficient to pay all the partnership debts; that on or about October 18th, 1878, Kramer made an assignment to the defendant Berdine, for the benefit of his creditors; that Berdine sold some of the partnership assets, under the assignment, to

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f the note. The summons was returnable June 6th, 1878. The declaration was filed on the return day of the writ. Service of the declaration on that day was acknowledged by the defendants, and Sylvester Hill made affidavit that on that day he served a copy of the declaration on his wife. The 6th of July was Saturday. The judgment was entered on Monday, the 8th, the earliest day on which it could, by the practice of the court, be entered, without consent of the defendants. The complainants did not hear of the existence of the judgment until September following. The bill is filed by Young and his wife, against Sylvester Hill and his wife and William T. Hill, and prays that the judgment may be declared fraudulent and void as against the farm, and that William T. Hill may be perpetually enjoined from proceeding to enforce or collect it out of that property, and may be ordered to release the farm from any lien which it may create thereon, or that the cancellation of the mortgage may be declared of no effect, and the mortgage re-instated as against the judgment, and that William T. Hill may be decreed to redeem and pay off the mortgage before enforcing his judgment against the farm.

That the complainants made careful inquiry of Sylvester Hill and his wife as to whether any judgments had been recovered against them which would be a lien upon the farm, is proved by the testimony on both sides. Had they known of the existence of the judgment, they would not have accepted the deed and given up the bond and mortgage. They relied upon the statement made by Sylvester Hill and his wife, that there was no judgment, to their knowledge. But there was, in fact, a judgment at that time, which had been entered the day before, under proceedings which they themselves had facilitated and hastened, and at that moment there was a levy on the farm under an execution on that judgment. The evidence is extremely conducive to the conclusion that they could not have been ignorant of the existence of the judgment, and that it was their purpose not to admit its existence to the

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omplainants. It was founded on a note given by them in May, while the subject of the reconveyance was being talked about by them and the Youngs. The note was, as before stated, for \$500. Of the amount, \$275 were, it is alleged, for borrowed money, said to have been lent in various sums, the smallest from \$5 to \$10, and the largest \$30; but no memorandum in writing of the loans was kept by either or any of the parties. The evidence of the existence of the alleged debt for borrowed money is by no means satisfactory. The note was payable on demand, and suit was brought on it within a week after its date. The proceedings in the suit were advanced to judgment by the aid of Sylvester Hill and his wife, they acknowledging service of the declaration, and he making affidavit that he had served the declaration on his wife. The agreement for reconveyance was made about the middle of June, and Sylvester Hill fixed as the time for making the reconveyance, the day after the day on which the plaintiff in the suit on the note would be entitled to judgment by the practice of the court. When, after the reconveyance had been made, an acquaintance of his said to Sylvester Hill that he thought he was foolish that he did not get the Mill street property (part of the property conveyed to Young's wife in the original transaction), as he might have done in addition to the bond and mortgage. Hill replied that Young "felt that he was smart, but if he did not look out he would get his fingers burnt before he got through." Mrs. Hill said to the same person, when he said to her that by the conveyance she had lost everything, "No, we have got the judgment for \$500," referring to the judgment in favor of William T. Hill. The evidence is most persuasive and convincing, notwithstanding the testimony of Sylvester Hill to the contrary, that they did know of the existence of the judgment, or had reason to believe that it had been entered.

It is urged, however, that if it be held that they misled the complainants, that fact will not deprive William T. Hill of his rights, or prejudice him in his assertion of them. But

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the evidence leads to the conclusion that there was complicity between him and them in the recovery of the judgment, and that his and their object was, by means thereof, to circumvent and defraud the complainants.

It is urged that the complainants were guilty of negligence in not searching the records to ascertain whether there were any judgments, but if the defendants conspired to circumvent the complainants by means of the judgment, they are in no situation to impute negligence to the complainants.

In *Miller v. Wack*, Sax. 204, it was held that the improper and fraudulent cancellation of record of a prior mortgage without payment or satisfaction, and without consent of the mortgagor, would not extinguish it as against a subsequent encumbrancer, or give him any advantage. See, also, *Trenton Banking Co. v. Woodruff*, 1 Gr. Ch. 117; *Garwood v. Eldridge*, Id. 145; and *Harris v. Cook*, 1 Stew. 345.

In *Garwood v. Eldridge* it was, indeed, held that one who purchased land on the representation of the grantor that certain mortgages were the only encumbrances upon it, and, at the request of the latter, applied the entire purchase-money to the payment of those mortgages, and subsequently found that there was a valid subsisting judgment against the land, was not entitled to relief in equity, though the grantor was wholly insolvent, so that the grantee had no remedy on the covenants in his deed; but that case differs in its circumstances from this. There the grantee applied the purchase-money to paying off the mortgages, and caused the mortgages to be cancelled of record. Here it is a mortgagee who merely accepts what was substantially a release of the equity of redemption in discharge of the mortgagor's liability for the mortgage debt. In that case relief was sought on the ground that the grantee caused the mortgages to be cancelled unwittingly and without a knowledge of the legal effect of the act. The court held that if he, indeed, made such a mistake, it was a mistake as to the law, and would not avail him, and that he was negligent in not examining the records for judgments against the property.

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There was no fraud on the part of the judgment in that case. The case was complicated, too, by the land under the judgment. Here the mistake was to the existence of the judgment, and the evidence that William T. Hill was guilty of fraud in the transaction was cogent. That case, it may be remarked, expresses the undoubted right to relief in equity when there is a mistake in the facts as well as of law, or some mistake of the truth, or fraud or contrivance. See, also, on this point, *Green v. M. & E. R. R. Co.*, 1 Beas. 165, and *Net v. Macknet*, 2 Stew. 52.

There is another consideration of great weight. The complainants intended by the reconveyance to acquire and so extinguish the equity of redemption. They supposed that the mortgage was essential security against any intervening encumbrance, and they would not have consented to its cancellation. Young says that he acted as agent for his wife in the transaction, and that he would not have given up the mortgage to be cancelled had he known of the judgment, or that the mortgage would be of any use to him, and that he would not have done so had the mortgage had they been aware of the existence of the judgment. They gave it up upon the representation of the mortgagors that there were no judgments. It was of the bargain that the mortgage should be cancelled that was the liability of the Hills that was to be satisfied. Sylvester Hill gives as his reason for procuring the cancellation of the mortgage, that he supposed it was necessary to the extinguishment of their liability. Under such circumstances, equity will, if it can be done without prejudice to the rights of the mortgagee, set aside the cancellation and re-instate the mortgage, and give the mortgagee actual or equitable protection for the protection of his title. The mere fact that the mortgage has been given up and cancelled, will not render the court powerless to grant the relief. *Chilver v. Weston*, 12

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Stantons v. Thompson, 49 N. H. 272; *Spaulding v. Crane*, 46 Vt. 292; *Jones on Mort.* §§ 869, 873.

Here no rights of third parties intervene to forbid the granting of the relief. The legal advantage which William T. Hill has by the cancellation obtained, he ought not, in conscience, to be permitted to retain. There is, as before stated, abundant reason for believing that he obtained it through fraud upon the complainants; that the judgment is but the means devised by him and Sylvester Hill and his wife to compel the complainants to pay for the equity of redemption of the property \$500 which they never agreed nor expected to pay, and which it was not contemplated by the agreement that they should pay; that it was a mere artifice designed to extort that money from them, and intended for no other purpose whatever. Of course an advantage so obtained cannot be retained in equity. *Eyre v. Burmeister*, 10 H. of L. 96.

It is urged, on behalf of William T. Hill, as an equitable consideration in his favor, that part of the claim for which the note was given was for work done on one of the houses conveyed to Young's wife by Sylvester Hill and his wife in the original transaction, and that he delayed, at Young's request, proceeding upon his lien until the power of enforcing it was lost. But William T. Hill himself testifies that he permitted the time to elapse, and lost his power of enforcing the lien, through his own forgetfulness.

The complainants are entitled to the relief which they seek. The cancellation will be annulled and the mortgage re-instated, and Sylvester Hill and his wife will be ordered to deliver the mortgage up to them, that they may hold it as a muniment of title, and William T. Hill will be restrained from selling the property under his judgment, except subject to the mortgage.

The complainants are entitled to costs.

Prudden v. Lindsley.

TIMOTHY H. PRUDDEN

v.

OSCAR LINDSLEY and others.

Generally this court will not set aside a verdict on an issue at law where the judge before whom such issue was tried certifies that he is satisfied with the verdict, and that it ought to be regarded as conclusive on the questions submitted to the jury.

Motion for final decree on remittitur from the court of errors and appeals, and counter motion to set aside the verdict on the issue.

Mr. H. C. Pitney, for the motion

Mr. A. Mills and Mr. B. Williamson, contra.

THE CHANCELLOR.

On the coming up of the verdict of the jury on the issue at law, a motion was made to set it aside on the ground that, inasmuch as the title to the land on which the alleged highway is, was held in trust "for the use of the school in Green Village, or the building of a school-house, or, if it should be required to be put to that use, to be kept for the use of the school in Green Village as long as grass grows and water runs," from 1813 (since which time the alleged highway has been created), no dedication can be presumed, because no grant can be presumed, seeing that the trustees could not have granted to the public the easement claimed, without a breach of their trust; and the right of highway was claimed on the ground of presumed dedication by the trustees. *Prudden v. Lindsley*, 1 Stew. 378. The motion was successful, this court entertaining that view in regard to the presumed dedication. On that ground alone, and because it was undeniable and, indeed, was admitted,

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land was so held in trust from 1813, and the dedication was admitted to have taken place at a sequent thereto, the bill was dismissed.

Evidence taken in the trial at law was not, as appears in opinion, used as evidence in the cause in any way to determine the merits of the controversy, nor did the court undertake to dispose of the case on the testimony adduced on the trial of the issue, although, in the opinion, there are strictures upon it; but the bill was dismissed solely on the ground that the existence of the trust for a period anterior to the alleged dedication and ever since rebade the presumption of dedication.

On appeal, the decree of dismissal was reversed and the case remitted to this court to be proceeded in. *Prudden v.*

2 Stew. 615. A motion is now made on behalf of the defendants to set aside the verdict, and, on behalf of the complainant, a motion is made for a decree that the judgment be made perpetual.

The appellate tribunal held that the trustees might dedicate the land to public uses not incompatible with the trust, and that an adverse public user for the purpose of a highway on the land so held in trust, continuing for twenty years, would establish the highway against both the trustees and the *cestuis que trust*, whether consistent with the trust or not, and although the trust is for the benefit of the whole or a part of it. If then, the verdict has established the satisfaction of this court a free and uninterrupted use of the land by the public for twenty years, with the acquiescence of or adversely to the trustees, the controversy between the parties is ended in favor of the complainant.

The questions to be determined by the jury, as stated by the court, were, whether there was a public road on the use lot, and, if there was, how long it had existed, whether it bounded along its southerly side the complainant's land. The jury found that there was a public road on the premises, that it had existed for twenty-three years, and that it bounded on its northerly side the complainant's

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land. The judge before whom the issue was tried, certifies that the questions of fact were supported on both sides by a multitude of witnesses, and were presented in a manner that made the verdict upon them, as he thinks, conclusive, and he adds that he is, therefore, satisfied with the verdict rendered as to its result in finding a highway.

Generally this court will not set aside a verdict solely on the ground that it was against the evidence, if the judge certifies that he is not dissatisfied with it. *2 Dan. Ch. Pr. 1121; Gibbs v. Hooper, 2 Myl. & K. 353.*

In this case the judge goes farther, and certifies not only that he is satisfied with the verdict, but that it ought, under the circumstances, to be regarded as conclusive on the questions submitted to the jury. The questions were fairly submitted to the jury by a charge which instructed them that in order to find that there was a highway, it must appear that there was dedication or adverse public user for twenty years. The greater part of the evidence was directed to the question of user. That the jury found the verdict upon adverse user by the public for twenty years, and not on dedication by the act of building the iron fence, is evident from the fact that the period mentioned in it extends back beyond the time of the building of the fence, which was either in 1854 or 1855. There was a conflict of testimony as to the year in which it was built. They found that the property in dispute had been used as a highway for over twenty-three years, that is, as far back as 1852 (the suit was begun April 21st, 1875, and the verdict was rendered in December following), at least two years before the fence was built. It is therefore evident that the verdict did not depend on the proof of dedication as evidenced by the building of the fence, but that it was found on the evidence of user.

I have carefully considered the evidence, and see no reason for putting the parties to the expense of another trial at law, or of further litigation in this court. The motion for a new trial will be denied, and the injunction will be made perpetual.

Shippen v. Paul.

WILLIAM W. SHIPPEN and others

v.

MIFFLIN PAUL and others.

A way for a road or turnpike reserved in a deed for lands, and laid down as such on a recorded map of the premises, does not authorize any company to occupy and use it as a turnpike, without making compensation.

Bill for injunction. On motion to dissolve.

Mr. J. S. Applegate, for the motion.

Mr. C. Haight, contra.

THE CHANCELLOR.

The bill is filed for an injunction to restrain the defendants, who claim to be officers of the Highlands and Seabright Turnpike Company, from entering upon the lands of the complainants at Seabright, and pulling down and removing fences, outhouses and barns thereon, &c. The property in question, which it is the object of this suit to protect, is a strip of land of about twenty-eight feet wide, in the rear of the lots of the complainants, on the ocean front of which are their sea-side cottages. The bill states that the tract of land of which those lots are part, and which contained about seventy acres, was bought by the defendant, Mifflin Paul, as agent for William W. Shippen, one of the complainants, and Samuel B. Dod; that Shippen and Dod paid or secured to be paid all the purchase-money; that Paul took the conveyance in his own name, but executed and delivered to them a declaration of trust; that afterwards, part of the property having been sold, the residue was, by mutual releases or deeds of quitclaim, divided between the three, Paul having, by an arrangement with Shippen and Dod, obtained an interest therein;

Shippen v. Paul.

and that on the making of that division, the declaration of trust was delivered up to Paul; that the deeds by which the partition was made excepted sixty-six feet for a road or turnpike, as laid down on the map hereinafter mentioned; that, to show the interests and evidence the rights of the parties, a map was made and filed in the county clerk's office, on which the road is laid down; that the road does not, on the map, run through the whole property (the road appears to be a distance of about two thousand feet in a straight line from its northerly terminus on the map to the northerly line of the tract, the whole length of the tract in a straight line being about five thousand six hundred and fifty feet); that the three, Shippen, Dod and Paul, are owners, in equal shares, of the land reserved for the road; that about a year ago the complainants laid out a large sum of money in improving the road for public use along the rear of their lots; that in 1875 an act was passed incorporating the Highlands and Seabright Turnpike Company; that though there was a pretended organization of the company, there never was a legal one; that though some contributions of money were made, intended for the payment of installments on subscriptions to the stock, no stock was, in fact, legally subscribed, and the company had no legal existence; that though the company pretended to construct its road from the Navesink bridge to the Seabright bridge, it did not, in fact, do so according to the requirements of the charter, and soon abandoned the enterprise, and for three years thereafter took no care of the road; that in the spring of 1879 a pretended re-organization of the company, at the instigation of Paul, was made, but it was merely a pretence, and that he is fraudulently endeavoring, by means of it and the pretence that the complainants have encroached on the turnpike, to compel the complainant to pay him a large sum of money for his own use.

The action complained of is the requirement of the turnpike company that the complainants shall remove, out of the *situs* of the road laid down on the map, fences and

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ings placed there by them, which the company insists encroachments upon its turnpike, and which it threatens to remove if the complainants do not do so. I do not think it necessary to consider the question raised by the bill as to the organization of the company. Though the company claims to have constructed its road in 1875, the road has never been used as a turnpike. The company neither shows nor alleges that it has any title whatever to the land over which it asserts dominion. It does not appear to have acquired a right to it in any way. It does not even set up a grant from Paul. It seems to rely upon acquiescence. The fact that, by the reservation in the deed to Shippen and Dod, the land laid down on the map as a public road is reserved for a public road or turnpike, does not give to any turnpike company that might see fit to occupy the land the right to use it for a turnpike without giving compensation.

The answer states that the complainants, or some of them, who owned lots at the time of the first organization of the turnpike company, encouraged the construction of the road as a toll and turnpike road, and all acquiesced.

The statement is not verified, and it is new matter. Again, it may be remarked, it appears by the answer that the design of the company in making the new organization, and requiring the complainants to remove alleged encroachments, is not to exercise the franchise of the turnpike for the benefit of the public, but rather to compel the complainants to pay a debt which the defendants claim is a lawful debt of the company due to Paul.

The answer states that the defendants are, equally with the complainants, desirous of making the road free, but they insist that its debts should first be paid; and it further states that the company, through Paul, in July, 1875, proposed to the complainants that if they would pay \$3,000 on account of the principal of his alleged debt, Paul would release the debt and interest, but the

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company would consent that the road should be a **free** road, and would relinquish its franchises, which **proposi-**tion the complainants rejected.

The injunction should be continued until the hearing.

THE SECOND UNION CO-OPERATIVE LAND AND BUILDING
SOCIETY and another

v.

THOMAS HARDY and another.

Specific performance of a contract for the sale of lands against a defendant in possession of the premises since the time of making the contract, was ordered where the defendant set up outstanding claims of dower by the wives of two former owners, such claims having been extinguished in the one case by a conveyance of such right to the complainant, and in the other by a conveyance directly to the defendant, although one of the deeds was not obtained until after the bill had been filed

Bill for specific performance. On final hearing on pleadings and proofs.

NOTE.—In a bill for specific performance a vendor may, after his agreement to sell, complete his title at any time before filing his bill (*Cotton v. Ward*, 3 Mon. 305; *Grundy v. Ford*, Litt. Sel. Cas. 129; *Viele v. Troy R. R. Co.*, 20 N. Y. 184); or before answer (*Beebe v. Dowd*, 22 Barb. 255; *Brush v. Vredenburg*, 1 Edw. Ch. 21); or before the report (*Mortlock v. Buller*, 17 Ves. 315; *Dutch Church v. Mott*, 7 Paige 77; *Jenkins v. Hiles*, 6 Ves. 646; *Beverly v. Lawson*, 3 Munf. 317); or before the hearing (*Clanton v. Burgess*, 2 Dev. Eq. 13; *Ley v. Huber*, 3 Watts 367; *Wynn v. Morgan*, 7 Ves. 202; *Roach v. Rutherford*, 4 Desaus. 426, 436); or before the decree (*Hepburn v. Dunlop*, 1 Wheat. 178; *Langford v. Pitt*, 2 P. Wms. 630; *Clute v. Robison*, 2 Johns. 595; *Seymour v. Delancy*, 3 Cow. 446; *Brown v. Huff*, 5 Paige 235; *Allerton v. Johnson*, 3 Sandf. Ch. 77; *Luckett v. Williamson*, 37 Mo. 389; *Drexel v. Jordan*, 104 Mass. 407); unless great injury be done thereby to the vendee (*Brashier v. Gratz*, 6 Wheat. 528; *Taylor v. Porter*, 1 Dana 421; *Richmond v. Gray*, 3 Allen 25; *Christian v. Cabell*, 22 Gratt. 82. See *Sharp v. Trimmer*, 9 C. E. Gr. 422; 2 White & Tudor's Lead. Cas. * 529.—**REP.**

Second Union Co-operative &c. Society v. Hardy.

r. *E. S. Atwater*, for complainants.

r. *M. T. Newbold*, for defendants.

THE CHANCELLOR.

This case appears to me to present no difficulty. The defendants, on the 14th of August, 1866, agreed with the complainant James B. Mingay, by written contract, signed him and them, to buy of him a lot of land on Cook st, in Jersey City, for \$2,000, of which \$50 were paid at signing of the agreement, \$450 were to be paid when deed was delivered (which was to be on the 18th of September, 1876), and the balance, \$1,500, was to be secured by their bond and a mortgage therefor, with interest, on the premises. The property was to be conveyed free from all encumbrances. Mingay was treasurer of the complainant company, and held the title in trust for it. The defendants, at or about the time of making the agreement, let possession of the premises, and have occupied them ever since. By the answer they object that the title was defective because of the outstanding contingent right of one of the wives of two of the owners of the land through which Mingay derived his title. But the complainant company has extinguished the right of one of those women by releasing from her and her husband to it, and it has obtained and holds a deed for the property in fee from the other and her husband to the defendants. One of those deeds was obtained after the commencement of this suit, but the fact that it was not obtained until after the beginning of the suit, does not, under the circumstances, prevent a decree for specific performance.

The defendants have offered no evidence. They will be required to accept the conveyance from the complainant company (the wife of Mingay has joined him in the deed from him to the defendants), and will be required to pay the \$450 which was to be paid on the delivery of the deed, and interest on the same, and interest on the rest of the purchase-money, for the

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time they have been in possession. And they are to be credited for any money which they may have paid to the receiver by way of rent. The title appears not to have been perfected until August, 1878, when the contingent right dower of Ann Lillis was extinguished by the deed from her to the complainant society. The title was therefore perfect when the suit was begun, and there does not appear to have been any demand on the defendants that they accept the title after it was perfected. They should have costs complying with the decree.

ELI A. YOUNG

v.

JOHN COLLIER and others.

Defendants in possession of the premises in their answer to a bill for specific performance of a contract to sell an undivided interest in lands together with an assignment of complainant's interest in an ice crop on the premises, objected to carrying out their agreement (although their objections were not set out specifically) on the ground of defect in the title to the lands, and also because an assignment of the interest in the ice crop had not been tendered with the deed. At the hearing it appeared that the only defect in the title at the time of the contract was a lien for unpaid taxes for two years, which were subsequently paid; that no objection was then made because no assignment of the ice crop was tendered, and that the real ground of defendant's refusal to comply with the contract was an apprehension that they would not be able to carry on business on the premises amicably with the other tenants in common.—*Held*, that the objections constituted no bar to specific performance.

Bill for specific performance. On final hearing evidence and proofs.

Mr. P. H. Gilhooly, for complainants.

Mr. C. T. Cowenhoven, for defendants.

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THE CHANCELLOR.

By an agreement in writing made by and between the parties to this suit, dated February 19th, 1878, and signed by them, the defendants purchased from the complainant, and he agreed to convey to them accordingly, the interest (three-eighths) which he owned in certain land in Middlesex county (used for flooding to make ice for sale, and for storing ice in the building thereon), known as the Kennebec Ice Company's property, and owned in undivided shares by the persons composing the firm of ice dealers known as The Kennebec Ice Company, and containing twenty-three acres, or thereabouts, for which they were to pay him \$3,000, as follows: \$200 at the signing of the agreement, \$800 when a satisfactory title should be made to them for the property, \$500 in their note, payable July 1st, 1878, and \$1,500 by their bond, to be secured by a mortgage of the premises, of even date with the deed, and to be payable in two equal installments, in three and four years, with lawful interest payable semi-annually. It was also thereby stated that the complainant held the control of an eighth of the ice to be produced on the pond for the year ending December 1st, 1878, although the title to it was held by F. A. Ayer, and it was thereby agreed that the complainant would cause that interest to be assigned to the defendants for their sole use and benefit on the payment by them to him of the sum of \$62.50.

The bill is filed by the seller to compel specific performance of the agreement. The defendants paid to the complainant, on signing the agreement, the \$200 which they stipulated to pay at that time. About the 23d of February, a few days after the making of the agreement, the complainant tendered to one of the defendants, Green, a deed for the three-eighths and a bond and mortgage to be executed by the defendants according to the agreement. Green took the deed but did not read it. Both Green and Collier, on the same day and very soon after the tender, refused to carry out the agreement, and asked the complainant to mention

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the terms on which he would absolve them from liability under it. He refused to do so and declared that he would take legal proceedings to enforce performance on their part.

The answer substantially admits the tender. It alleges that the title was imperfect when the deed was tendered, but it does not specify in what respect. On the hearing it was insisted that it was imperfect because of the existence of a mortgage of \$216.94 upon the whole property, which was uncanceled of record, and because the taxes on the property for two years were unpaid, and because a claim of lien for \$20 was made by the person in whose hands certain ice-tools were, the complainant's interest wherein was sold with his interest in the land, although the agreement is silent on that subject; and further, because the property was subject to liabilities for improvements (buildings) which had been put on the property by the firm, and to unpaid liabilities of the firm to workmen; and because the complainant did not tender with the deed an assignment of the interest in the ice crop for the year ending December 1st, 1878, mentioned in the agreement. In the first place it appears that the defendants did not refuse to perform the agreement because of those objections or any of them, but, when the deed was tendered, refused on other grounds to carry out the agreement, and sought to get rid of the obligation of the contract. They entered into possession of the property immediately after the agreement was made, and took into their possession the tools before mentioned, or some of them. The reason they gave the complainant for not carrying out the agreement was, that "things were not in the right shape," and this expression appears to have had reference to matters not connected with the title to the property.

According to the testimony of the defendants themselves, none of the objections now made to the title were made at the time of the tender of the deed. Nor was any mention made of any of them except the claim made upon the tools by the person who had them in his keeping. As to that claim, it appears that it constituted no lien whatever upon

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e tools, and the person who made it testifies that he would have delivered them up without payment of it, to the complainant, on request.

The complainant swears that while mention was made of the claim, no objection to performing the contract was made on that account. The fact that the mortgage of \$216.94 had not been cancelled on the record, constituted no reasonable objection to the title. The mortgage was made in the year 1813. It was given to secure the payment in one year from the date of the amount of a bond, with interest. The bond was, at the time of the tender, in the possession of Wesley Benner, who was the owner of an undivided interest (one-fourth) in the property, and it was cancelled. It appears not only by the receipts endorsed thereon, but by the accounts of the administrators of the mortgagor, to have been paid in full in 1817, over sixty years ago. Nor was there any ground of objection from apprehension of claims of mechanics liens in respect to the buildings on the property. There were no such claims on file, and of the buildings that which was first built was built in 1873 and 1874, and the last one in 1875. It is unnecessary to speak of the debts of the firm, though it may be stated that it appears that there are none unpaid in fact.

The defendants urge that the complainant did not tender to them with the deed the assignment of the interest of Ayer in the ice crop. But they did not demand it, nor did they object to receiving the deed because the assignment was not delivered with it. If they had done so the complainant swears he would have obtained it for them. So, too, in regard to the taxes; he would have paid them if the defendants had objected to the title because they were not paid. They were paid in March, 1878.

It is clear, from the testimony, that the defendants refused to accept the deed, not because of defects in the title, but because they were apprehensive that they would not be able to carry on the business or use the property harmoniously with Benner. Before the complainant tendered the deed,

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they went to the gentleman who had drawn the agreement for them, and inquired of him what would be the consequence of their refusal to carry it out. He answered that he was unable to say, but presumed that they would be compelled at least to forfeit the \$200 which they had paid at the signing of the agreement. The complainant testifies that they told him, on the day when the tender was made, that they would forfeit the \$200 and would throw the whole thing up and would have nothing more to do with the matter. He says he remonstrated with them and expressed his surprise, saying that he supposed he was dealing with honorable men, and he says the reason they gave for throwing up the bargain was that they had seen Benner, who owned one-fourth of the property, and they were satisfied that they could not get along with him without trouble.

There should be a decree of specific performance, and the defendants should pay costs.

DANIEL W. CULVER

v.

ALMENA M. CULVER, administratrix.

1. Complainant filed a bill for an account under an agreement made in 1868 with I. B. C., to pay him one-eighth of the profits realized by I. B. C. in a certain contract by I. B. C. and S. H. to build a railroad. The road was finished in 1869, and I. B. C. and S. H. made their final settlement in 1874, although litigation as to part of their compensation was not ended until 1877. Complainant's bill was filed in November, 1877. In June, 1875, I. B. C. paid complainant \$175 on account of his share of the profits.—*Held*, that the right to an account was not barred by the statute of limitations, because it did not begin to run until 1874 the date of the final settlement between I. B. C. and S. H., and it bill was filed within six years from that time; and, also, because of the payment by I. B. C. to complainant in 1875.

2. Secondary evidence of the contents of a written instrument although not strictly competent at the time when offered,—*Held* that it can be rendered so in this case, under the circumstances, by a witness who testifies that the original was lost or destroyed.

Culver v. Culver.

Bill for account. On final hearing on pleadings and proofs.

Messrs. Culver & Herbert, for complainant.

Mr. Peter Bentley, for defendant Almena M. Culver, administratrix.

THE CHANCELLOR.

The complainant claims to be entitled, under an agreement made February 29th, 1868, between him and his brother, Isaac B. Culver, deceased, to one-eighth of the profits of a contract, dated February 3d, 1868, made by Isaac B. Culver and Samuel A. Hetfield with two railroad corporations, for the building of a railroad from Glen's Falls to Fort Edward, in New York. Culver and Hetfield were equally interested in the contract. The railroad was finished in the summer of 1869. There appear to have been considerable profits from the contract. The bill is filed for an account of the profits, and a decree requiring the administratrix of Isaac B. Culver to pay to the complainant the amount which shall appear on the accounting to be coming to him under the agreement. Though the road was completed in the summer of 1869, there was no final settlement between the contractors until 1874. Indeed, it appears that it was not until after that time, and as late as 1877, that the last of the litigations which were necessary for the collection of some of the securities received as compensation under the contract, was ended. Those litigations appear to have been *Town of Queensbury v. Culver*, 19 Wall. 83, decided in 1873, and *People ex. rel. Hetfield v. Trustees of Village of Fort Edward*, 70 N. Y. 28, decided at May term, 1877, of the New York court of appeals. In November, 1875, Isaac B. Culver died. He paid for the complainant, and at his request, on account of the money coming to him under the agreement, on the 1st of June of that year, \$175. In August following, he admitted to Delos E. Culver, their

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brother, that there were about \$3,500 due to the complainant on the contract, and said that he would furnish him money with which to go into business on account of it.

The administratrix of Isaac B. Culver has answered. Hetfield has not. The plea of the statute of limitations is set up in the answer. Clearly, the complainant is not barred by that statute. In the first place, the bill was filed on the 2d of November, 1877. Though, as before stated, the road was completed in the summer of 1869, there was no final settlement between Isaac B. Culver and Hetfield, his co-contractor, until 1874; and, besides, it appears that it must have been impossible to determine what were the profits until a still later period, until the termination of the last of the litigations before referred to. The general rule is that the cause of action or suit arises when and as soon as the party has a right to apply to the proper tribunals for relief.

In *Davies v. Cram*, 4 Sandf. 355, the suit being for contribution for a loss on a venture of cotton sent to France, was held that the statute did not begin to run until the complainant received the account of sales from France.

In *Atwater v. Fowler*, 1 Eln. 417, it was held that a delay was imputable to the complainant (the suit was for an account) in not calling for an account until the defendant was in a situation to render him a final one upon the close of the transaction.

In this case, it does not appear that the complainant would have been entitled to an account from Isaac B. Culver before the final settlement of the latter with Hetfield in 1874; and it does not appear that he would have been entitled to it even then, for the validity of some of the securities received in payment under the contract was the question. In the next place, Isaac B. Culver, as before stated, in June, 1875, a few months before his death, paid \$175 for the complainant, at the latter's request, on account of the money due him under the agreement.

Proof of the contract was made by an examined copy in the examination of Hetfield, who was the first witness sworn

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in the cause. It did not appear in the case, until after his testimony was closed, that the contract itself was lost or destroyed. The counsel of the administratrix objects that the secondary evidence was not competent at the time when it was offered, though it would, of course, have been so after the admission of counsel, which was subsequently made, that the contract was lost or destroyed, and could not be produced. The copy became competent evidence of the contents of the contract as soon as the admission was made. The admission does not appear to be accompanied by any reservation of the right to object to the secondary evidence already in the cause, but seems rather to have been intended to remove any such objection by rendering unnecessary any proof of loss. It refers to no particular period of time since which it has been impossible to produce the contract, but is unqualified, and must, in fairness, be held to have relation back to the time when the secondary evidence was offered. But, further, the evidence to which objection is made was not offered to prove the contents of the contract, but merely the fact of its existence in connection with the question whether, under it, profits were, in fact, realized by the contractors; and such proof was competent.

The counsel of the administratrix insists, on another ground, that no decree for an account can be made against her, viz., because it does not appear that the complainant is even now entitled to it, inasmuch as it does not appear that she can now render a final account, and so ascertain the profits. But she, by the answer, admits that all the compensation has been received with the exception of the amount of the bonds of the village of Fort Edward (\$20,000), which Hetfield, as survivor, was endeavoring, by legal proceedings, to collect. And she does not set up the objection now under consideration. Besides, it may be remarked, it appears by the report of the case (cited above) that that litigation ended unfavorably to the plaintiff therein. The complainant seems to have performed his part of the contract. He is entitled to an account.

Denman v. Nelson.

JAMES C. DENMAN

v.

ANNIE NELSON and others.

1. On a hearing on bill and answer and depositions, a mere avowment in the answer that the defendants "claim and charge" that the rents, issues and profits received by the complainant as mortgagee in possession, were more than sufficient to satisfy the mortgage in suit, not conclusive on the complainant as a statement of a fact.

2. Depositions as to facts neither admitted nor denied by the answer, are admissible both at the hearing and before the master on the accounting.

3. A provision in complainant's mortgage that he should apply the rents &c. derived from the premises to satisfy his mortgage, does not preclude him from showing that he did apply such rents in part to other prior or concurrent encumbrances thereon.

Bill to foreclose. On final hearing on bill and answer and depositions.

Mr. P. H. Gilhooly, for complainant.

Mr. S. D. Haines, for the answering defendants.

THE CHANCELLOR.

This cause appears to have been set down for hearing on bill and answers and depositions. There is no replication. The suit is for foreclosure and sale of mortgaged real property in the city of Elizabeth. But two of the defendants (one the present owner of the property, and the other his grantor thereof) have answered. By their answers, they allege that the complainant stands in the relation of mortgagee in possession of the premises, and that he has always had the control of the renting thereof, and has received, and still continues to receive, the rents, issues and profits thereof, and, therefore, is chargeable with the amount

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which should have been collected for such rents, issues and profits; and they "claim and charge" that such amount has been more than sufficient to pay off entirely and discharge the whole principal and interest.

The counsel of the answering defendants insists that the cause having been set down on bill and answer, this "claim and charge" must be accepted as true. But it is merely a "claim and charge;" it is no statement of a fact, but is, at most, only an assertion that the answering defendants believe that, if an account were taken, it would appear that the complainant has received, or is chargeable with, rents enough to satisfy the mortgage. It is mere pleading. The reason for setting down the cause on bill and answer, evidently was that the complainant's counsel found nothing to deny in the answer, after the allowance of the exceptions. The possession of the complainant as mortgagee is not denied.

The counsel of the answering defendants objects to the admission of the depositions. But they relate only to the complainant's bond and mortgage, which are neither admitted nor denied by the answer, and certain conveyances mentioned in the bill and which the answers pray may be produced and proved, and the account. They, therefore, are admissible. The testimony on the subject of the account is admissible at this stage to show that there ought to be an account. *Hudson v. Trenton Locomotive Co.*, 1 C. E. Gr. 475. He also insists that, in taking the account, the complainant is bound, by the provision in the bond and mortgage set out in the bill, to apply all the rents and profits to the payment of the bond and mortgage in suit. But that provision was a mere grant of authority to the complainant to collect the rents, issues and profits until the principal of the bond and mortgage should be paid. As to his disposition of the rents, it appears by the proof that there are two other mortgages on the property, besides that which is in suit in this cause, one for \$3,500 and interest, and the other for \$500 and interest, and that the complainant has applied some of the rents

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to the payment of interest on them. The mortgage for \$500 gives him the like authority to collect rents which is given by the mortgage in suit. The mortgage for \$3,500 is prior to the other two. The complainant appears to have been mortgagee in possession under all these mortgages, and he had a right to appropriate the rents to the interest of all or any of them. The complainant has offered in evidence his books of account, and has himself testified to his receipts and disbursements. There may be no need of any further proof in the cause. There will be a reference to a master to take the account, and the testimony already taken relative to the account may be used by him.

EMILY MCGUCKIN and others

v.

MILLER KLINE and others.

1. A bill alleged that a defendant was concluded by a decree in a former suit, and also insisted on such defendant answering the whole bill, including matters settled by that decree. The answer set up a denial of some of those matters.—*Held*, that such answer was not therefore impertinent, since it complied with the prayer of the bill.

2. Such defendant cannot avoid the effect of a former decree on the ground that he, as complainant therein, omitted certain *cestuis que trust* as parties in that suit.

3. Fraud in the consideration of a prior encumbrance, may be set up by a mortgagee in his answer, without filing a cross-bill; and a general allegation of such fraud is sufficient, where the fraud alleged is that the mortgage was given to defraud creditors, and was without consideration.

4. An answer may submit legal propositions arising on facts admitted by the bill or facts which it states.

Bill to foreclose. On exceptions to master's reports sustaining exceptions to answers for impertinence.

McGuckin v. Kline.

Mr. J. R. Emery and Mr. G. Berry, for the exceptions.

Messrs. Magie & Cross, contra.

THE CHANCELLOR.

The bill states in substance that Edmund B. McGuckin, on the 23d of April, 1860, was indebted to James B. McGuckin in the sum of \$2,000, for money lent and advanced; that, in order to secure payment thereof, the former gave to the latter a deed of that date for an undivided third owned by him of certain land and premises described in the bill; that the deed, though absolute on its face, was intended for a mortgage; that it was acknowledged and was recorded as a deed on the 25th of April, 1860; that afterwards, Edmund B. McGuckin, he being still the owner in fee of the third before mentioned, procured partition of the premises to be made on his application, by proceedings before a justice of the supreme court, and in that partition certain tracts respectively designated as A and B, described in the bill, were assigned to him, whereby he became the owner thereof in severalty, subject to the mortgage to James B. McGuckin; that James B. McGuckin, by deed of conveyance, conveyed to the complainant Sherwood, on the 19th of May, 1871, his right, title and interest in the land, and that the indebtedness was also thereby assigned; that the conveyance and assignment were made to Sherwood for a valuable consideration, for the benefit of the other complainants, who are the wife and children of James B. McGuckin; that on the 1st of August, 1869, Edmund B. McGuckin mortgaged lot A to Garret Berry for \$2,000; that Berry assigned the mortgage to Matthias Ludlow, who filed his bill to foreclose it, and purchased the mortgaged premises under the decree; that on the 1st of April, 1869, Edmund B. McGuckin mortgaged lot B to Jonas W. Tooker for \$2,000, and on the 1st of October, 1869, he also mortgaged that lot to John T. Hewitt, who assigned the mortgage to Clark C. Dunham, cashier of the

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Hunterdon County Bank, who assigned it to the defendant Miller Kline; that Kline filed his bill to foreclose that mortgage against Edmund B. McGuckin and his wife and Tooker and others, and obtained a decree for sale; that on the 22d of December, 1871, Kline filed a bill in this court against James B. McGuckin, Edmund B. McGuckin and the complainant Sherwood, to set aside the complainants' deed as fraudulent and void, and that by the decree in that suit it was adjudged that the deed was a security in the nature of a mortgage, and that \$2,000, with interest from the date of the deed, were due on it, and that Kline might redeem or might sell subject to the complainants' mortgage; that Kline did not redeem, but proceeded to sell, under the decree, and, at the sale, bought the property, and that both Ludlow and Kline took their deeds after the recording of the complainants' mortgage deed, and with full notice thereof, and hold the premises so bought by them respectively, subject to the lien of the complainants' mortgage. The defendants Kline and wife and Ludlow and wife have answered. To their answers exceptions were filed, and on reference to a master they were sustained. The cause comes before me on exceptions to the master's reports.

In the prayer for answer in the bill, the complainant calls on the defendants to answer on oath as to all and singular the statements in the bill, as fully and particularly as if they were there again repeated, and the defendants and each of them thereto particularly interrogated, &c.

The answering defendants, by their answers, deny the statements of the bill as to the consideration, character and validity of the complainants' deed (which the complainants allege is a mortgage), and allege that the instrument is in fact, what it purports to be, an absolute deed of conveyance for the land therein described, and not a mortgage. They deny that any money was lent and advanced by James B. McGuckin, the grantee, to Edmund B. McGuckin, the grantor. And they allege that the deed was given for full consideration and fraudulently, and with intent to

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the creditors of the grantor. As to the answer of Kline and wife, objection is made by the exceptions that such denials and allegations are impertinent, in view of the fact that the bill states, and the answer admits, that the suit in this court mentioned in the bill brought by Kline to set aside the complainants' deed, resulted in an adjudication that the deed was, in fact, a mortgage to secure \$2,000 and interest, and was a lien prior to the mortgages under which Kline claims. But while the bill substantially alleges that Kline is concluded by the decree, it does not rest there, but insists on his answering the whole bill.

Under such circumstances the complainants cannot justly complain that the defendants have complied with the demand, and have followed the general rule which requires a defendant who undertakes to answer, to answer fully. *Emery v. Pickering*, 13 Sim. 583; *Attorney-General v. Foster*, 2 Hare 81. What effect the adjudication referred to is to have in determining the issue, is another matter. *Attorney-General v. Foster*, *ubi supra*.

Kline is bound by the adjudication, notwithstanding the fact that the *cestuis que trust* of Sherwood were not parties to the suit. He instituted the suit, and made the trustee a party, and did not join the *cestuis que trust*, although he knew of the existence of the trust, and who the *cestuis que trust* were. See *Kline v. McGuckin*, 9 C. E. Gr. 411. If he chose to proceed to the final adjudication of the cause without making the *cestuis que trust* parties, the fact that they were not parties cannot avail him in an effort to avoid the effect of the decree.

But, further, as to the exception: Whatever is called for by the bill, is proper to be retained in the answer. *Desplaces v. Goris*, 1 Edw. 350; *Wagstaff v. Bryan*, 1 Russ & M. 28; *Hogencamp v. Ackerman*, 2 Stock. 267. If the complainant calls for an answer to impertinent matter, he must take the answer, though it be impertinent. *Woods v. Morrell*, 1 Johns. Ch. 103.

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It is urged that if the part of the answers which the complainants' mortgage is to be excused on that the bill calls for it, it, nevertheless, should be as impertinent, because it cannot avail the defendants. This objection is based on the ground that the answers set up fraud against the complainants and seek to set the mortgage aside for that reason. It is insisted, cannot be done by answer, but must be affected by means of a cross-bill. And it is further urged that if the defence can be set up by answer, it is presented as to be available, inasmuch as it consists of the general statement that the deed was given without consideration, and with intent to defraud the creditors of the grantor.

The defence goes to the validity of the complainants' mortgage as a prior lien to the mortgages of Kline and Ludlow claim. It may be set up in the answers just as well as could a defence which goes to the validity of the complainants' mortgage original in that it has been paid off, or otherwise satisfied and extinguished as against the defendants' title.

In *Dayton v. Melick*, 12 C. E. Gr. 362, it was held in defence that the mortgagee materially misrepresented the contents of the mortgaged premises to the mortgagor, and the sale thereof by the former to the latter, to be void. It was held by the acre, and the mortgage having been paid by part of the purchase-money, might be set up in a suit by the mortgagee against the mortgagor to set aside the mortgage. See, also, *Hogencamp v. A* 267; *Ames v. N. J. Franklinite Co.*, 1 Beas v. *Hulfish*, 7 C. E. Gr. 471, 477.

The present is only the case of one denying the validity, as against him, of the mortgage of another. The statement of the answers that the complainants' deed was voluntary, with no fraud, fraudulent and void, and that the design was to place the title to the property in the

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person than the grantor, in order to cheat his creditors. This allegation is, in some respects at least, manifestly specific enough. *Johnson v. Helmstaedter*, 3 Stew. 124. But if not, it cannot affect the complainants injuriously.

In *Jolly v. Carter*, 2 Edw. 209, it was said that if the defence set up by an answer does not give facts with sufficient particularity to lay a foundation for proofs, the testimony, when offered, will be rejected, and the complainant is not then prejudiced by the insufficient matter.

The objection to the statement in the answers that the defendants had no notice of the complainants' mortgage, is not well taken. If, as to Kline, the question of notice has been adjudicated upon adversely to him, the record will effectually disprove this statement in his answer; and the production of the deed itself, with the certificate of recording thereon, may be proof of notice as to both Kline and Ludlow. But the bill states that they took their respective deeds of conveyance under foreclosure of the mortgages under which they claim, with full notice of the complainants' deed. The defendants, therefore, were called upon to answer on this point, or they were, at least, at liberty to do so. The statement in the answer of Ludlow and wife, that lot A was sold with full knowledge on the part of the complainant Sherwood; that he attended the sale and bid on the property, but neither he nor any other of the complainants gave notice that he or they had any claim on the property, is impertinent. It is wholly immaterial.

The objection to the statement in the answers that the defendants insist that, by the partition, the complainants' deed was "extinguished, and for nothing holden," should not prevail. The pleader evidently intended to plead that the effect of the partition was to deprive James B. McGuckin, who then held the title which the complainants now hold, of any title he may have previously had under his deed. The question is not whether the position can be maintained, but whether the statement of what the defendants regard as a legal proposition arising from the facts, is

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impertinent. It is within the province of an answer to submit questions arising on admitted facts in the bill, or facts which it states. *Mitf. Pl. 15; Bennett v. Neale, Wight. 324.*

The objection to the prayer for relief in the answers, is well taken. An answer can pray nothing but to be dismissed the court. Of the exceptions to the answer of Ludlow and wife, the first and second will be allowed. The rest will be overruled. Of the exceptions to the answer of Kline and wife, the seventh will be allowed, and the rest will be overruled.

JOHN S. NEVIUS

v.

JOHN V. EGBERT and others.

Leave granted to the owner of the equity of redemption of mortgaged premises to redeem, where the sale of the premises under foreclosure proceedings took place contrary to the sheriff's assurance that it would be adjourned.

Suit for foreclosure. Motion to set aside sheriff's sale under *fi. fa.* for sale of mortgaged premises.

Mr. J. H. Jackson, for complainant

Mr. G. Berry, for Hector Toulmin.

THE CHANCELLOR.

Hector Toulmin, the owner of the equity of redemption of the mortgaged premises, makes application for an order setting aside the sheriff's sale under the execution issued in this cause. The complainant bought the property at that

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sale. The ground on which the application is based is surprise. There is no room to doubt that Mr. Toulmin was surprised by the sale. He supposed that he had an assurance from the sheriff that the sale would not take place on the day on which the property was sold, but would be adjourned, and he appears to have had good reason to believe so. It is to be remembered, however, that the sale was of his own property under decree of foreclosure. He alleges that he was able to save the property by buying it himself at the sale, and would have done so if he had supposed that the sale was to take place on the day when the property was sold. He ought now, under the circumstances, to have an opportunity to redeem it, but he is entitled to nothing more.

THE HOBOKEN LAND AND IMPROVEMENT COMPANY

v.

THE MAYOR AND COMMON COUNCIL OF THE CITY OF HOBOKEN.

Where no special grounds for the interference of equity are shown, parties claiming an exemption from the assessment of a tax by reason of a special statute, must apply to a court of law for relief. That a great many tax-payers will be affected by such assessment will not, of itself, give equity jurisdiction.

Bill for injunction. On order to show cause. On bill and answer.

Mr. L. Abbett, for complainants.

Mr. M. W. Niven, for defendants.

THE CHANCELLOR.

This suit is brought to restrain the assessor of taxes of the city of Hoboken from assessing any tax on a certain part

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(it is what was formerly Weehawken township) of the territory of the city to raise certain moneys specified in the bill. The complainants are owners of property in that part of the city, and claim exemption for themselves and all other owners of property there from taxation for those particular moneys, under the act of the legislature (*P. L. 1874 p. 402*) by which that territory was added to and became part of the city, though they do not deny that they are subject to the taxation which is about to be imposed as to other moneys. That act provided that the annexed territory should be liable to taxation the same as other property in the city, unless, within thirty days from the passage of the act, the owners of a majority in value or area of the territory annexed should file their assent to the act with, and pay \$500 to, the treasurer of the city, and that the payment of that sum should be in lieu and satisfaction of all tax and imposition that might thereafter be levied by the city to pay the principal or interest of any indebtedness incurred before the passage of the act, except certain indebtedness specified in the act, and that the city authorities should so apportion the taxes of the city that no part of the indebtedness incurred by the city before the passage of the act, except that which was particularly specified in the act, should ever be levied on or collected from the annexed territory. The bill states that the assent was filed and the \$500 duly paid, and claims that the territory is exempt accordingly.

The city has answered, admitting the intention to levy the tax, but denying the exemption as to the moneys for which the tax is to be assessed, and it denies the right to relief in this court. An order to show cause was made by consent, to bring the questions involved in the case before the court.

To warrant the interference of equity with the assessment and collection of a tax about to be levied under color of a public law, there must be some peculiar ground of equity jurisdiction. *Hoagland v. Township of Delaware*, 2 C. E. Gr. 106, 115, 116; *Cooley on Taxation* 540; *Borroughs on Taxa-*

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tion 363; Western R. R. Co. v. Nolan, 48 N. Y. 513; High on Inj. § 354.

The remedy of the complainants in this case is by *certiorari*. They complain that the defendants are about to levy and collect an illegal tax, while the defendants, on the other hand, insist that the tax is legal. No fraud or corruption is alleged. The question presented by the bill is merely whether the annexed territory is or is not exempt from the tax in question. The fact that a great many tax-payers will be affected by the assessment will not of itself give jurisdiction to this court. Nor is jurisdiction to be assumed on the ground suggested by complainants' counsel, specific performance. The complainants have a complete and adequate remedy at law, and the common law courts are the proper forum for the consideration of the question presented.

Said Chancellor Kent, in *Mooers v. Smedley, 6 Johns. Ch. 28, 31*, where an injunction was sought to restrain the collection of sums inserted in the annual tax-list to be collected of owners of lands &c., for moneys allowed by the supervisors of a town under acts of the legislature, and pursuant to the vote of the town, for wolf bounties: "The review and correction of all errors, mistakes and abuses in the exercise of the power of subordinate public jurisdictions, and in the official acts of public officers, belongs to the supreme court. It has always been a matter of legal, and never a matter of equitable, cognizance. This is not the case of a private trust, but the official act of a political body, and in the whole history of the English court of chancery there is no instance of the assertion of such a jurisdiction as is now contended for. The superintending control in these cases has always been exercised in the court of king's bench, and nowhere else, and that court has proceeded by *certiorari, mandamus, prohibition, information, &c.*"

It appears by the answer, it may be added, that there is no reason whatever why recourse should not be had to law. The injunction will be denied, with costs.

Tomson v. Tomson.

PETER C. TOMSON

v.

ELIZABETH TOMSON.

In a case of fraud,—*Held*, that this court has jurisdiction to restrain the payment of moneys in the hands of a sheriff of this state, under proceedings of foreclosure in this court, or the assignment of mortgages on lands in this state by a defendant, although both parties are residents of another state.

Bill for relief. On motion to dissolve injunction, on bill and answer.

Mr. D. J. Pancoast, for the motion

Mr. A. C. Scovel, *contra*.

THE CHANCELLOR.

The bill states that in or about the year 1853, the complainant became acquainted with the defendant, who was then introduced to him as a single woman, by the name of Miss Elizabeth D. Murphy; that she then, and subsequently, pretended to him that she was a single woman, and, as such, received his addresses with a view to matrimony; and that they were subsequently, on the 1st of October, 1854, married at Philadelphia, she passing by the name of Elizabeth D. Murphy. The bill further states that they lived together, though unhappily, for several years; and that in August, 1876, they separated, and articles of separation were executed by them, in pursuance of which he paid over to her, merely in consideration of the separation, \$2,200 in cash, gave her his note for \$10,000, which was paid at maturity, and also assigned to James W. Beaumont, as trustee for her and for her benefit, bonds and mortgages on property in this state, to the amount of \$37,800; and that he subsequently discovered that, at the

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time of the marriage, she was not, in fact, a single woman, but was the wife of a man by the name of Samuel Naghel, who subsequently, and on or about the 21st of October, 1867, died.

The bill prays relief on the ground of fraud, the fraud consisting in the false pretence on the part of the defendant that she was a single woman at the time when she was married to the complainant. If she was, at that time, the lawful wife of Samuel Naghel, the marriage between her and the complainant was, of course, void, and her concealment of that fact up to the time of the arrangement for the separation, and her receipt of the money and securities which were paid and delivered over to or for her, under the articles of separation, was, if she, in fact, was not the lawful wife of the complainant, a fraud upon him, for which relief may be had in equity, so far as any of the securities are concerned which are yet within the reach of the court. By her answer, she admits the marriage between her and the complainant at the time mentioned in the bill, and says that previously, and on the 21st of August, 1841, she was married to Samuel Naghel, in the city of Philadelphia, but denies that the marriage with Naghel was valid, alleging that, on the other hand, it was null and void by reason of the fact that he was, at the time of that marriage, the lawful husband of another woman, to whom he was married in 1835. She says that she cohabited with him as her lawful husband for a few months after her marriage to him, in ignorance of the fact that he was, at the time of her marriage to him, already a married man. She further says that he was a sea-faring man, and soon after her marriage to him, and in November, 1842, he went to sea, and in November of the following year, and before his return, she heard of his former marriage, and subsequently, and in the same year, met his lawful wife in the city of New York, where he had maintained her and his three children by her, as his legitimate family, for several years previous to his attempted marriage to the defendant; that on discovering

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the imposition which had been practiced upon her by him in inducing her to believe him to be a single man, she sought the advice of counsel in Philadelphia, and, after stating the circumstances, was advised that the marriage was null and void, and that she might safely treat it as such, and resume her maiden name as a single woman, and that she acted accordingly, and repudiated Naghel as her husband; that she and her friends and relations immediately took measures to have him arrested and punished for the injury he had done her, and for his offence against the law; but he did not return from his voyage when he was expected; that she has never seen him since he went to sea in 1842; and, in the year 1846, she was credibly informed that he had died in New Orleans, and since that time she has never heard from him in any way, and has always believed him to be dead. She denies that she made any false or fraudulent representations or statements to the complainant to induce him to marry her, and claims that the marriage between them was lawful. She admits the separation and the cause of it, attributing it, however, to the conduct of the complainant. She alleges that there is, and was, pending, when the bill was filed, a suit brought against her by the complainant for divorce in the court of common pleas for the city and county of Philadelphia, to the libel wherein she has answered denying the right of the complainant to the divorce; and she states that the suit has not yet reached a determination, but is still pending. She insists that the subject of complaint in the bill in this cause is cognizable only by that court. The question discussed on this motion was whether this court has jurisdiction of the subject of this suit, in view of the pendency of the litigation for divorce in the state of Pennsylvania.

The injunction was sought in this state in view of the fact that the property mortgaged by the mortgages transferred for the benefit of the defendant upon their separation, is in this state, and the debtors are here. And, besides, foreclosure proceedings have been had in this court on one of the

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mortgages, under which the premises have been sold by the late sheriff of the county of Gloucester, and one object of the complainant in bringing this suit was to prevent the payment to the defendant of the money raised on the execution for her. Part of the relief sought in this suit by injunction, viz., the preventing of the payment of the money by the sheriff to the defendant, could not have been obtained in the state of Pennsylvania. Moreover, the bill may be amended so as to include the mortgage debtors, and thus more complete relief, by injunction, be obtained. The courts of Pennsylvania can only reach the wife. The mortgage debtors and sheriffs are not subject to their jurisdiction. Both of these parties are, and were, when the bill was filed, residents of the state of Pennsylvania, and, if there was pending at the time when this suit was commenced, a litigation in Pennsylvania in which the relief sought in this suit might be granted, the complainant should be remitted to that forum. But it does not appear that any such litigation exists. There is, indeed, a suit for divorce, but it is for divorce merely, and has no reference to the property in question.

The property which the complainant seeks by this injunction to reach, consists of mortgages of real property in this state, or the proceeds of the sale of mortgaged premises here under the process of this court. Courts of law entertain the suit of a foreign creditor under our attachment act against even the choses in action of his foreign debtor here.

The answer does not deny the fact stated in the bill in regard to the pretence and representation by the defendant to the complainant, at the time of their courtship and marriage, that she was a single woman and had not been married. She does not state that she communicated to him the fact that she had been married to Naghel. She admits that she resumed (as she says, by the advice of counsel) her maiden name, and treated her marriage with Naghel as null and void, and as if it had never taken place. It remains, therefore, for her to establish the facts on which she relies

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as rendering her marriage to Naghel void. She offers no proof of them in connection with her answer, except her own uncorroborated affidavit.

The motion is denied. If, however, it shall be made to appear that the defendant requires, for her reasonable support during the pendency of this litigation, the interest upon the mortgages in dispute, a proper allowance will be made to her accordingly.

RICHARD SUTPHIN

v.

THE INHABITANTS OF THE CITY OF TRENTON.

1. Under a sale of lands to pay an assessment for improvements, a purchase thereof by the city is valid, although the power to make such purchase was not conferred until after such assessment had been laid.

2. The charter provided that the damages for any improvement "be fairly and justly assessed by commissioners."—*Held*, that the court would not presume that the amount of damages assessed exceeded the benefits, merely because the commissioners' report omitted to state that fact.

Bill to remove cloud from title. On demurrer and plea.

Mr. E. L. Campbell, for defendants.

Mr. J. C. Potts, for complainant.

THE CHANCELLOR.

The bill is filed under the "act to compel the determination of claims to real estate in certain cases, and to quiet the title to the same" (*Rev. p. 1189*). It seeks relief against an assessment made by the defendants upon the complainant's property, for benefits in opening a street in

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the city of Trenton, and it prays relief, also, from a sale of the land thereunder, to the defendants, for the term of fifty years, under which they claim title for the unexpired balance of the term. To so much of the bill as prays relief against the sale, the defendants have filed a general demurrer, alleging for cause of demurrer, want of equity; that the supreme court has jurisdiction of the subject matters, and that the complainant's remedy at law is complete, clear and certain; that the complainant does not offer to pay the defendants the money which appears by the bill to be due them for the assessment, and that the bill was not filed in due time. The plea is to the relief sought against the assessment, and it sets up, as a bar, an adjudication of the supreme court on *certiorari*, prosecuted by the complainant himself, sustaining the assessment, and an adjudication of the court of errors and appeals affirming the judgment.

The bill states that the defendants had no legal authority to become the purchasers of the land at the assessment sale, and that the sale, and all title to be derived under it, are void. The sale took place in April, 1878. The supplement to the defendant's charter, approved in 1875 (*P. L. 1875 p. 346 § 7*), provides that, whenever any lot shall be offered for sale by virtue of that act or the charter itself, for the collection of any assessment, and there shall be no responsible bidder for it, it shall be lawful to strike it off to the inhabitants of the city for the term of fifty years. The defendants, then, had lawful authority to purchase at the sale.

But the complainant still insists that no title passed by the sale because the assessment was made under an unconstitutional law. The act under which it was made (*P. L. 1866 p. 398 § 77*) provides that the damages which owners of land will sustain by the opening of a street shall, with the cost of the land for the street obtained by agreement, be fairly and justly assessed by commissioners, upon such lots or subdivisions of lots as, in their opinion, will be benefited by the improvement.

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The complainant insists that the provision that the whole of the damages and price shall be assessed on the property considered to be benefited, without regard to whether the assessment exceeds the amount of benefits or not, is in contravention of his constitutional rights. But the charter provides that the assessment shall be fair and just, and in such a case that cannot be a fair or just assessment which exceeds the amount of the benefit, and though the language of the act appears to contemplate the assessment of the whole amount of the damages and price upon the property benefited, without regard to the amount of benefit, yet it will be construed, if practicable, in such manner as not to authorize the imposition of an assessment beyond the amount of benefit received. It will, if practicable, be so construed as not to violate, but to protect, the constitutional rights of the property owner.

In *Village of Passaic v. State*, 8 Vr. 538, where a municipal charter provided for the assessment of the cost of grading a street, upon the lands fronting on the improvement, in proportion to the benefit to be received by each lot or parcel thereof, the charter was so construed as to limit the assessment to the amount of benefit. It was construed as if it contained an express limitation of the assessment to the land benefited, and the further limitation of the amount of the assessment to the benefit received. On the principle of that case, the provision of the charter of Trenton, under consideration, may be sustained. The assessment under that charter is expressly limited to the property benefited, and it is expressly provided that it must be fair and just.

In *Village of Passaic v. State*, the assessment was not expressly limited to property benefited, nor was it expressly limited to the amount of benefits. The provision was for an assessment upon the lands fronting on the improvement, according to the benefit to be received by each lot or parcel. Here it is expressly limited to land benefited, and is to be just and fair.

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The fact that no provision is made in the charter for any deficiency which might exist if the whole amount could not fairly and justly be assessed on the lands benefited, constitutes no objection to the construction. It was so held in *Village of Passaic v. State*.

The bill states that the commissioners in the case in hand reported to the common council that, in their opinion, the complainant's land described in the bill would be benefited by the laying out and opening of the street, and that, having justly and fairly considered the amount of such benefit, they had assessed upon the land the sum of \$133. The amount does not appear by the statements of the bill, it may be remarked, to have exceeded the benefits. But if the act is not unconstitutional, the complainant is entitled to no relief in this suit. The assessment proceedings in such case were not a nullity. The assessment itself may have been liable to be set aside, because (if such was the fact) it did not appear by the commissioners' report that the amount did not exceed the benefits (*Village of Passaic v. State, ubi supra*), but that liability does not, *per se*, render it null and void. Relief against it in that respect was to be obtained by *certiorari*, the appropriate remedy.

The plea avers that the assessment was brought into the supreme court by *certiorari* on the prosecution of the complainant himself, and that he there objected to it because, among other things, as alleged, it was "unequal, unjust and unfair," and that it was there affirmed, and that the judgment of that court was subsequently affirmed on error in the court of last resort. Under the decision in *Jersey City v. Lembeck*, 4 Stew. 255, the complainant is not entitled to relief. He has not only had a remedy at law, but has availed himself of it.

The demurrer and plea are both good.

McClave v. City of Newark.

WILLIAM H. McCLAVE and others

v.

**THE MAYOR AND COMMON COUNCIL OF THE CITY OF
NEWARK.**

1. Municipal assessments that are unconstitutional, and consequently void, and the sales of lands thereunder, may be set aside in equity.

2. In a bill to quiet title, objections that the complainant has not alleged peaceable possession of the premises in dispute, and that no action to test the defendant's title thereto was pending, come too late at the hearing.

Bill to quiet title. On final hearing on pleadings and proofs.

Mr. C. F. Hill, for complainants.

Mr. Henry Young, for defendants.

THE CHANCELLOR.

This suit is brought under the act "to compel the determination of claims to real estate in certain cases, and to quiet the title to the same" (*Rev. p. 1189*). The complainant seeks to set aside certain assessments made under the charter of the city of Newark for municipal improvements, one for grading, curbing and flagging a street, two for opening streets, and the other for widening and opening a street. The property has been sold to the city under the assessments. The first-mentioned assessment (for grading, curbing and flagging) was made under the 109th section of the charter (*P. L. 1857 p. 167*), and is identical with the provision for assessment condemned in *Bogert v. City of Elizabeth*, 12 C. E. Gr. 568. The others are under the 105th section of the charter (*P. L. 1857 p. 166*), which provides that the common council shall ascertain the costs, damages and

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expenses of laying out and opening, altering, widening, or straightening any street, highway or alley within the city, and shall cause to be made a just and equitable assessment thereof upon the owners of all the lands and real estate intended to be benefited thereby, in proportion, as nearly as may be, to the advantage each shall be deemed to acquire. This provision is, under the authority of the decision in *Village of Passaic v. State*, 8 Vr. 538, not unconstitutional.

The assessment for grading, curbing and flagging, and the sale thereunder, must, as to so much of the property mentioned in the bill and affected thereby as, at the time of filing the bill, was owned by the complainants, be set aside as absolutely void. *Bogert v. City of Elizabeth*, *ubi supra*. But no relief will be granted as to the property described in the bill which they did not claim to own when this suit was begun. No relief will be granted as to the other assessments, or the sales thereunder, for the reasons given in *Smith v. Newark*, decided at this term.

It is urged, on behalf of the defendants, that the bill does not state that the complainants were, at the time of filing the bill, in peaceable possession of the property in respect to which relief was prayed, nor that no suit to enforce or test the title claimed by the defendants was pending. But, as was said in *Smith v. Newark*, the defendants have answered and do not allege that those conditions to the maintenance of the suit do not exist, and it does not appear that they do not.

WILLIAM CLEVELAND

v.

THE ESSEX PUBLIC ROAD BOARD.

Where a complainant has, by laches, lost his remedy at law against an assessment illegal but not void, this court will not interfere on the ground that the defendants threaten and intend to sell his property under it.

Cleveland v. Essex Public Road Board.

Bill to quiet title. On final hearing on pleadings and proofs.

Mr. J. L. Blake, for complainant.

Mr. J. W. Taylor, for defendants.

THE CHANCELLOR.

The bill is filed under the act of 1870 (*Rev. p. 1189*) to quiet title, and relief is sought against certain assessments made by the defendants upon the complainant for benefits to his land in respect to an improvement known as Park avenue, in Essex county. These assessments were made, as is claimed, under the provisions of special statutory authority. The complainant objects to them as illegal. He does not impugn the authority as being in contravention of his constitutional rights. He had a remedy by *certiorari* against any illegality in the proceedings, but appears to have lost it by laches. He alleges that it was by mistake. But the fact that he lost his opportunity to obtain a review by *certiorari* of the proceedings complained of through mistake, will not, of itself, avail to induce this court to examine into the legality of the proceedings. *Lewis v. City of Elizabeth*, 10 C. E. Gr. 298; *Dusenberry v. Newark, Id.* 295. Nor will the fact that the defendants threaten and intend to sell his property for non-payment of the assessment. Though the proceedings on which the declaration of sale will be founded cannot be impeached collaterally, they may be reviewed at any time on *certiorari* or other proper proceedings in the supreme or circuit court (*Rev. p. 1045 § 15*). The complainant must, therefore, be left to his legal remedy. *Jersey City v. Lembeck*, 4 Stew. 255, 270.

The bill will be dismissed, with costs.

Central R. R. Co. of N. J. v. Pennsylvania R. R. Co.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and others
v.

THE PENNSYLVANIA RAILROAD COMPANY and others.

1. The fact that the property of an insolvent railroad company is **under** the charge of this court, does not in anywise secure to the **company** protection against lawful competition in its business, or secure **for** its property immunity against liability to lawful condemnation.

2. A general law authorizing any number of persons not less than **seven** to form a corporation to construct a railroad, does not exclude **non-residents** as corporators.

3. That the places from and to which the road is to be constructed **must** be specified, is sufficiently complied with by designating one **terminus** as "at or near Bergen cut."

4. The grant by the legislature of the power to exercise the right of **eminent domain** for the building of railroads for public use, to any **persons** who will undertake to construct them, leaving it to such **persons** to select the routes for themselves, is of itself a determination by **the** legislature that such roads are necessary or useful for the public.

5. It is undoubtedly within the power of the court (and it is its **duty**), where an abuse of the general railroad law is attempted by the **unlawful** application of its provisions to a private use, to restrain the **unauthorized** proceedings.

6. A corporation cannot, in its own name, subscribe for stock or be **a** corporator, under the general railroad law; nor can it do so by a **simulated** compliance with the provisions of the law through its agents **as** pretended corporators and subscribers of stock.

7. An attempt by a corporation to avail itself unlawfully of the **general** railroad law to build a railroad, will, on complaint of the party **injured**, be enjoined as an abuse of the law.

Bill for injunction. On order to show cause. On bill and affidavits annexed, and affidavits on the part of the National Docks Railway Company.

Mr. B. Gummere, Mr. B. Williamson and Mr. J. D. Bedle,
for complainants.

Mr. Leon Abbett, for the mayor and aldermen of Jersey City.

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Mr. Isaac W. Scudder, for the Pennsylvania Railroad Company.

Mr. H. C. Pitney, for the National Docks Railway Company.

Mr. Sidney Ward of New York, for the National Storage Company.

THE CHANCELLOR.

The bill is filed by the Central Railroad Company of New Jersey, and Francis S. Lathrop, receiver for the creditors and stockholders thereof, for an injunction to restrain the defendants, other than the city, from constructing a railroad from the line of the Pennsylvania Railroad at or near Bergen cut, to the National docks, upon any route or location across any of the lands or railway tracks of the Central Railroad Company, under or by virtue of the provisions of the general railroad law, and from taking and condemning, or instituting any proceedings to take or condemn, any lands or railway tracks of the Central Railroad Company, or to acquire the right of crossing those lands or tracks for the purpose of constructing a railroad across them, under the provisions of that act, and to restrain the city from granting permission to the other defendants to lay their road in Jersey City in such manner as necessarily to cross the main line and railways of the Central Railroad Company at grade.

The bill states that the Central Railroad Company is the absolute owner in fee of certain land in Jersey City therein described at length, which it lawfully acquired for its uses and purposes in the exercise of the public franchises granted to it, and that that land, or a large part thereof, is now in constant use for those purposes, and that all of the land is both necessary and convenient for the present and future due and proper exercise of its corporate franchises and functions, and in the transportation of passengers and

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merchandise to the termini of its routes and branches, and for the yarding of its cars, and in the necessary storage of merchandise transported thereon, and in the shipping thereof to its destination, and for other like purposes; that the Pennsylvania Railroad Company is a foreign corporation existing under the laws of the state of Pennsylvania; that in 1873 it became possessed, as lessee (or grantee), of the railroads, franchises and property of the United New Jersey Railroad and Canal Company, and, among others, of the main line of the railroad extending from the Delaware at Trenton to the Hudson at Jersey City; that at that time its lessor (or grantor) had located its road through Jersey City, and exhausted by actual user, or lost by non-user, all of its chartered powers of relocating or changing its route there, and of constructing additional branches thereto, or making any new termini; that the Pennsylvania Railroad Company, under the lease, had no more power than its lessor (or grantor), and has acquired none since; that it has no corporate existence in this state, and no franchise to be a corporation here, except as such lessee (or grantee), and for the sole and exclusive purpose of performing the covenants of the lease or grant; that the National Storage Company is a private corporation, created under a special act of the legislature of this state, for the purpose of storing and transporting petroleum and other merchandise, and for other purposes incidental thereto, and although capable of holding lands for the purposes of its charter, it is expressly prohibited by it from storing petroleum within the territorial limits of Jersey City, and though it has become seized of a tract of land known as the National Docks, which is within the limits of that city, yet, because of that prohibition, it cannot lawfully hold or use that land to store petroleum thereon, or transport petroleum to it to be stored there, or demise or convey it to any other person or corporation for such purposes, or either of them; that it is an offshoot of the Pennsylvania Railroad Company, and under its control; that its capital stock is largely held by or in trust for per-

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sons owning large interests in or largely concerned in the management of that company; that the Pennsylvania Railroad Company, or its managers and officers, have conceived the plan of constructing a new branch from the main line of the railroad leased to it, extending from at or near Point of Rocks to some point on Communipaw bay, and of locating and establishing a new terminus on that bay particularly as an outlet for its transportation of petroleum, and for procuring a place for the storage thereof, and has caused estimates and plans, or surveys, of such new branch to be partially made; that the want of legal power to make such extension, and the impossibility of obtaining a special grant for the purpose since the adoption of the amendments to the constitution of this state in 1875, have prevented the execution of the plan; but, recently, the company has attempted to execute the design under the general railroad law, and to that end has concerted with the Storage Company to construct the new branch to the latter company's line on the bay, and to use and occupy that land as a terminus; that the Storage Company has entered into the scheme, and that there has resulted therefrom the formation, under the general railroad law, of the corporation called The National Docks Railway Company, by certain persons mentioned in the bill, all of whom are officers and employes either of the Pennsylvania Railroad Company or the Storage Company; that the corporation is merely colorable, and that the real purpose is to enable the Pennsylvania Railroad Company to build the branch and thus do indirectly what it could not do directly; that the stock has not been subscribed for in good faith; that the articles are not in conformity with the provisions of the law, and are void for uncertainty in the designation of one of the termini of the projected railroad; that the money deposited in filing the articles of association under the provisions of the general railroad law was furnished by the Pennsylvania Railroad Company and the Storage Company, and that neither the incorporators nor the National Docks Railway Company intend

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to equip or operate the road, but that it is to be operated and owned by the Pennsylvania Railroad Company.

The bill further states that no survey of the route or location of the railroad has been filed; that all of the route and locations which have been or may be proposed must cross the land of the Central Railroad Company, and that the road must necessarily occupy a part of the main line of tracks of that company and numerous branches and sidings thereof, at a short distance from the main terminus of the Central railroad, and that it is intended that the projected road shall cross them at grade; that over the main line of tracks so to be crossed and taken, an immense volume of passenger and freight traffic of the Central Railroad Company and its affiliated lines is constantly passing, and that such crossing of the main line would greatly endanger the safety of the passengers and freight transported thereon, and greatly obstruct the company in the present and future management of its business and in the construction of new tracks, sidings and buildings necessary therefor, and work irreparable injury; that the Central Railroad Company has for many years been lawfully engaged in the business of transporting petroleum from the city of Elizabeth and points west thereof, to Communipaw bay, and has with much skill and labor, and at large expense, built up and is enjoying a large and remunerative business therein; that the Pennsylvania Railroad Company and the Storage Company design, by the colorable use of the general railroad law, to create an unlawful competition with it therein; that the good will of its business has been taken into the custody of this court, and is now being administered under its direction; that the complainants are entitled to be protected from the unlawful combination and competition by this court; that the parties concerned in the scheme of building the branch road intend to take by condemnation a valuable part of the land and franchises of the Central Railroad Company in the custody and management of this court, without first applying to this court for permission so to do; that such intended action

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would be a contempt of court and violation of the settled principles of its administration, and that they should be enjoined accordingly; that the branch railroad is not, and will not in the future be, required by any public necessity, inasmuch as ample means for the transportation of petroleum is already provided by the main line of the Central Railroad Company and the branch therefrom to the National Docks, and, whenever additional facilities are needed, that company will promptly furnish them as they may be required, and that the branch is only to be used as a branch of the Pennsylvania railroad, and for the private use and benefit of the Pennsylvania Railroad Company.

The bill then presents various objections to the organization of the National Docks Railway Company under the general railroad law; it insists that three of the seven persons, the incorporators mentioned in the certificate of incorporation, are not citizens of this state, and therefore are not "persons" within the true meaning of the act; that if the corporation be created within the fair construction of the act, and capable of taking the franchises and exercising the power of eminent domain thereby conferred, the act itself is a violation of the fundamental principles of constitutional government and law, and of the first subdivision of the first section of the fourth article of the constitution of this state (which prescribes that the legislative power shall be vested in a senate and general assembly), because the power of determining that the necessity and occasion have arisen for divesting a citizen of this state of his freehold lands by the exercise of the power of eminent domain, is the highest prerogative power which can be exercised in a free state, and cannot be delegated by the legislature to private persons; that the power of eminent domain cannot lawfully be exercised, except upon previous lawful determination that the necessity and occasion have arisen for its exercise, and no such lawful determination has been made of the necessity and occasion of taking the lands and main line of the Central Railroad Company to construct the railroad described

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in the articles of association, and that therefore the parties who propose to build the branch, cannot lawfully take or condemn that land or main line for the purpose of building the branch, and that the general railroad law, so far as it confers upon those parties the power of eminent domain over the lands and railways of the Central Company, is unconstitutional and void; that if the legislative power of determining before referred to could be lawfully delegated to private persons, it cannot be lawfully delegated—as it must be held to be under the general railroad law—to the persons who are directly interested in determining that the necessity and occasion have arisen, because they are thus constituted and appointed by the act judges in their own cause, which is a violation of the fundamental principles of constitutional government and law, and of the rights and privileges reserved to each citizen of this state; that if the legislative power of determining could be lawfully delegated to the same private persons who are directly interested in the determination, and in its results, the act denies to the owners of lands to be affected thereby, any right or liberty of being heard on the determination, and all right of procuring the determination to be judicially reviewed by due process of law for error in fact or in law; that if the delegation of the exercise of the power of determination to private persons be lawful, a resulting power and duty is conferred upon and is inherent in this court of supervising and controlling the location and construction of the branch between the termini specified in its articles of association, and of requiring it to be so located and constructed as to inflict the least possible injury upon the property, franchises and rights of the complainants; that the persons who propose to construct the branch intend so to locate it as that it shall be constructed across a large number of important streets in Jersey City, and across over two miles and a half of the territory within that municipality; that the transportation of petroleum on such a route, through a large and growing

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city, will be perilous in the extreme to the houses along the route, and to the inhabitants thereof, and greatly obstruct the improvement of lots along and near the route, and greatly hinder the growth of the city; that the parties who propose to construct the branch intended to obtain from the mayor and aldermen of Jersey City authority to cross the streets of that city in such a manner that the branch will necessarily cross the main line of railways of the Central Railroad Company at grade, and so inflict unnecessary and irreparable injury upon the complainants, and that in the exercise by this court of its jurisdiction to supervise and regulate the location and mode of construction of a road between its termini, the corporation of Jersey City is interested.

The National Docks Railway Company has put in affidavits; one, that of its president, to the effect that it has finally decided to adopt a route for the branch, which is to cross the Central railroad about three hundred feet eastward of the round-house or locomotive-berth of the Central Railroad Company, and at an elevation above the tracks of the Central railroad at that point of about twenty-one feet, leaving a clear space of at least eighteen feet between the top of the rails of the Central railroad tracks and the under side of the truss of the contemplated viaduct, and that, at no time, has the company, or any other person, to his knowledge, contemplated building the railroad to cross the Central railroad tracks to the eastward of the round-house and engine-berth, at grade.

The other affidavit is made by the president of the Storage Company, who swears that the capital stock of the company is owned entirely by the individuals in whose names it stands; that, to the best of his knowledge and belief, none of it is owned or controlled, directly or indirectly, by the Pennsylvania Railroad Company, but that all the earnings, profits and emoluments of the Storage Company, and all its capital stock, belong actually, absolutely and in good faith to those individual stockholders in their own right,

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and not in trust, directly or indirectly, for the Pennsylvania Railroad Company; that the Storage Company procured the corporators and stockholders of the National Docks Railroad Company to organize that company, and that the organization was made in the interest of the Storage Company, which has agreed and expects to advance, out of its own funds, all the means necessary to purchase the right of way for, and to construct the railroad. None of the defendants have answered.

The action of this court is invoked for the protection of the complainants against the construction, under the provisions of the general railroad law, of a railroad (for the transportation of petroleum) from the New Jersey Railroad at or near Bergen cut, to the docks of the National Storage Company in Jersey City.

The main grounds of the application are as follows: That inasmuch as the property of the Central Railroad Company is in the hands of this court, under proceedings in insolvency, and the road in question will, if built, cross the railroad and lands of that company, it is necessary to obtain the consent of this court to such crossing; that the enterprise, though nominally undertaken by certain individuals as corporators, is, in fact, the enterprise of the Pennsylvania Railroad Company, which has no right, either under the general railroad law or otherwise, to build the road; that some of the seven persons named as corporators in the articles of association are not citizens of or residents in this state, whereas it is insisted none but citizens of or residents in this state can lawfully be corporators under the general railroad law; that the articles of association are not in compliance with the law, because one of the termini of the proposed road is not designated with sufficient certainty, and that the general railroad law is unconstitutional because it confers the power of determining upon the necessity of exercising the right of eminent domain upon those who are to exercise the right.

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The property of the Central Railroad Company is in **the** hands of this court, to be administered under the statute **by** virtue of proceedings in insolvency.

Incidentally, it is the duty of the court to protect, ~~pre-~~serve and husband it, and the statute (*Rev. p. 196, § 106*), imposes the duty of operating the railroad for the **use** of the public while it is in the hands of the receiver. **But** the fact that its property is under the charge of this court does not in anywise secure to the company protection against lawful competition in its business, or secure for its property immunity against liability to lawful condemnation.

Its relation to other enterprises and the community is not essentially changed. If it be contemplated to take its land by condemnation, the consent of this court will, in deference to the tribunal and the orderly administration of justice, be sought, and in a proper case it will be accorded as a matter of course.

The general railroad law (*Rev. p. 925*) provides that any number of persons not less than seven, where the proposed road is less than ten miles in length, and not less than thirteen where the proposed road is ten miles or more in length, may form a company for the the purpose of constructing, maintaining and operating a railroad for the public use in the conveyance of persons and property, or for the purpose of maintaining and operating any unincorporated railroad already constructed for the like public use; and for that purpose may make and sign articles of association, in which shall be stated the name of the company, the number of years it is to continue, the places from and to which the road is to be constructed or maintained or operated, the length of the road, as near as may be, and the name of each county in this state through or into which the road is made or intended to be made, the amount of the capital stock of the company, the names and places of residence of seven directors of the company where the road is less than ten miles long, the names and residences of thirteen directors where the road is ten miles or more in length, a majority

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of whom shall be residents of this state, who shall manage its affairs for the first year, and until others are chosen in their places; that each subscriber to the articles of association shall subscribe thereto his place of residence and the number of shares of stock he agrees to take in the company, and that, on compliance with certain conditions stated in the law, the articles may be filed in the office of the secretary of state, and that, upon tendering them to that officer to be filed, the persons who have so subscribed them, and all persons who shall become stockholders in the company, shall be a corporation by the name specified in the articles; and that every corporation formed under that act shall, in addition to the general powers set forth in the act "concerning corporations," have the powers granted by the general railroad law, among which is that of eminent domain, for the purpose of building its road, &c.

The complainants contend that the seven or thirteen persons mentioned in the law, who are to join in the articles of association, must be citizens, at least residents of or dwellers in this state, and that the legislature did not intend to confer the privileges upon others; that to construe the law so as to admit citizens of other states or foreigners to avail themselves of the benefits of the law, would subject the property of the citizens of this state, throughout its whole territory, to be taken against the will of its owners, upon compensation, for the advancement of the speculations in railroad enterprises, however wild and visionary, of those who have no interest in the state or its welfare. The legislature clearly did not intend to confine the advantage of the law to those who were citizens of or dwellers in this state. The language of the law is, "any number of persons, not less than seven, &c." The terms express no qualification. The law evidently contemplates that the minimum number may sometimes sign the articles, and that they will be the first directors, and the provision that a majority of the first directors shall be residents of this state is strong and con-

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clusive evidence of the intention of the legislature. It may be added that the fact that the law provides that some of the directors shall be residents of this state, is evidence of itself that the attention of the legislature was drawn to the subject of residence.

The legislature has not attempted to make any discrimination in the law against citizens of other states. The term it uses is "persons." Citizens of other states are, by virtue of the provisions of the constitution of the United States declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, entitled to all the privileges to which citizens of this state are entitled under the law.

It will be convenient to notice here the objection based on the designation of the termini of the projected road. It is insisted that while the specification of a terminus "at or near Bergen cut," which is more than a mile long, might, perhaps, be definite enough for a long line of road, it is by no means so for one only a mile and a half in length. The distinction does not appear to me to be well taken. The terminus in question is to be the junction with another railroad, and it is designated with sufficient definiteness for that purpose. In *State, M. & E. R. R. Co. pros. v. Hudson Tunnel Co.*, 9 Vr. 548, the articles declared that the tunnel was "to commence at some convenient and eligible point upon the western shore of the Hudson river, and within or near Jersey City or Hoboken," and it appears not to have been regarded as a ground of objection in that sharply-contested case. See, also, *State, W. J. R. R. Co. pros. v. Receiver of Taxes of Camden*, 9 Vr. 299. In *Chicago B. & Q. R. R. Co. v. Chamberlain*, 84 Ill. 333, a designation of a terminus as "some eligible and convenient point in the county of Du Page, there to connect with the G. & C. U. Railroad," was held sufficient.

The objection made by the complainants to the general railroad law is, that it commits the determination of the necessity for the exercise of the power of eminent domain

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to the persons who are to exercise it; whereas, it is urged it is the right of the person whose property is to be taken by the exercise of the power, to have the necessity determined upon by the legislature itself before his property is subjected to the exercise of the power. In other words, that the legislature must first pass upon and decide affirmatively the question whether the necessity for any particular public work exists, before private property can be taken by condemnation for it. It is an unquestionable principle of constitutional law that it is the province of the legislature to determine whether the necessity for the exercise of the right of eminent domain exists or not, and that its decision is not subject to judicial review. In *Tide Water Co. v. Coster*, 3 C. E. Gr. 518, the doctrine was enunciated by the Court of errors and appeals as follows: "It is one of the legislative prerogatives to decide the important question whether an enterprise or scheme of improvement be of such public utility as to justify a resort for its furtherance to the power of taxation or eminent domain. Primarily the judiciary has no concern in such matter. And not only this, but if the public interest be involved to any substantial extent, and if the project contemplated can in any fair sense be said to be promotive of the welfare or convenience of the community, the legislative adoption of such project is a determination of the question from which there is no appeal, and over which no other branch of the government has any supervision whatever. Whether a road or turnpike, a bridge or a canal, will subserve public or private needs, are inquiries addressed exclusively to the law-making power, whose answer, according to the genius of our government, must be final and irreversible." The power of determining the necessity may be delegated. The familiar instances of the delegation to municipal corporations and to surveyors of the highways in this state, furnish an example and illustration; and where the power is delegated to public or private corporations, or public officers or individuals, its exercise is no more subject to judicial review

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that it could be exercised it itself. *St. 221: M. 100*
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The grant of the power to exercise the right of eminent domain for building of railroads authorizes the legislature to undertake to construct them, and to select the routes for themselves, and to vest in the legislature that sole right of the property of the public. The legislature, in granting special charters for public improvement, such as railroads and canals, if ever, expressly declared the exercise of the power. It authorized the construction of the railroads, and granted the franchises, including the power of eminent domain. If the improvement was a public one, there could be no judicial inquiry as to the propriety of giving the power to the legislature. The property owner had no right to object, as contrasted with a general law, to the fact that the enterprise, and the termini of the road, was a public one, as in the instance of the Erie Canal Company, which was given to construct a canal between the Hudson river and the Delaware river, near Easton, and the Passaic river, and passing through the city of Morris. *P. L. 1834, p. 155*; or in that of the Camden and Amboy Railroad Company, which was given to construct a canal between Cooper's creek and Newton creek in Glou-

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chester county, to a suitable point to be by them determined on upon Raritan bay (*P. L. 1830 p. 33*). What could any particular land owner, whose property may have been taken for the public work, know, from such a charter, as to his liability to be affected by the charter, or the probability that his land would be taken? That would depend on the route which the company might adopt for itself.

By the amendments to the constitution, the legislature was shorn of its power to confine the building of railroads to such enterprises as it should specially designate and approve. By these amendments (*Const., Art. IV, § 7, pl. 11*), the legislature is not only prohibited from passing special laws granting to any corporation, association or individual any exclusive privilege, immunity or franchise whatever, but also from passing special laws granting to any corporation, association or individual the right to lay down railroad tracks, and it is required to pass general laws providing for such cases. It therefore cannot, by special enactment, give to any corporation, association or individual the right to build a railroad, but the right is to be given by general law. If it cannot grant the right to build a railroad by special act, it cannot itself determine the necessity for the exercise of the right of eminent domain in any particular case. It must, therefore, delegate the power.

It is urged that it is contrary to natural justice, that the determination of the necessity should be left to those who are to exercise the right, because no one should be judge in his own cause; and that the legislature, therefore, must delegate the power to some court or commission. But if the constitution is silent on the subject, the action of the legislature is final on this head. Such is the view both of the courts and text-writers. In *Giesy v. C. W. & Z. R. Co.*, 4 *Ohio St. 308*, the court held that no well-founded constitutional objection exists to committing the power of determining the necessity to those who are to exercise the power.

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in *C. R. I. & P. R. R. Co. v. Town of Lake, 71 Ill. 3*
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Says Judge Dillon (*Dillon on Mun. Corp.* § 465): "Of the necessity or expediency of exercising the right of eminent domain in the appropriation of private property to public uses, the opinion of the legislature or of the corporate body or tribunal upon which it has conferred the power to determine the question, is conclusive upon the courts, since such a question is essentially political in its nature and not judicial."

Says Judge Cooley (*Cooley on Const. Lim.* 538): "The authority to determine in any case whether it is needful to exercise this power, must rest with the state itself, and the question is always one of strictly political character, not requiring any hearing upon the facts or any judicial determination. Nevertheless, where a work or improvement of local importance only is contemplated, the need of which must be determined upon a view of the facts which the people of the vicinity may be supposed best to understand, the question of necessity is generally referred to some tribunal, and it may even be submitted to a jury to decide upon evidence. But parties interested have no constitutional right to be heard upon the question unless the state constitution expressly recognizes and provides for it. On general principles the final decision rests with the legislative department of the state, and if the question is referred to any tribunal for trial, the reference and the opportunity for being heard are matters of favor and not of right. The state is not under any obligation to make provision for a judicial contest upon that question; and where the case is such that it is proper to delegate to individuals, or to a corporation, the power to appropriate private property, it is also competent to delegate the authority to decide upon the necessity for the taking."

Said Chief-Justice Shaw, in *Wellington v. Petitioners*, 16 Pick. 87, 101: "It is objected that there was no adjudication that the laying out of Cambridge common and the enclosure thereof, were of common convenience and necessity. But the legislature are bound to no particular form. Represent-

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ing the authority of the commonwealth, if the act done is within the scope of their authority, the mode of doing it is sufficient, if done in any mode that is intelligible. The act itself is sufficient evidence of the opinion and judgment of the legislature that the public use contemplated would be of public convenience." See, also, *Secombe v. Railroad Co.*, 23 Wall. 108. Special charters were the bulwark of monopolies. The people, by the amendments to the constitution before referred to, undoubtedly intended to open wide the way to competition in railroad enterprises in this state. The legislature in 1875 passed the general railroad law in its present form; it was approved in April of that year. Though amended otherwise, it has remained unchanged in the feature now under consideration ever since, a period of more than six years. At least one important line of railroad has been built under it. If the law is objectionable in the particular complained of in this case, the remedy, in my judgment, is not with the judiciary, but with the people, through the legislature.

There is a remedy at law, by *certiorari*, for the land owner, not only against essential irregularities in the proceedings of corporations under the general railroad law affecting their right to condemn, but, also, against unwarranted invasion of his rights where the proceedings are otherwise valid, as where the attempt is made to take more land than the company is authorized to take, and the constitutionality of the law itself may be inquired into on *certiorari*. *State, M. & E. R. R. Co. pros. v. Hudson Tunnel Co.*, 9 Vr. 548; *Vail v. M. & E. R. R. Co.*, 1 Zab. 189; *Doughty v. Somerville & Easton R. R. Co.*, 1 Zab. 442; *State, Mayor &c. of Jersey City pros. v. Montclair R. R. Co.*, 6 Vr. 328.

But the remedy at law is not always adequate. It would obviously not be so where the injury apprehended is an unlawful competition in the exercise of chartered privileges wherever the complainant in the given case would be unlawfully injured in the exercise of a franchise by an

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enterprise based on an unconstitutional enactment, but which might be carried on without recourse to the exercise of any extraordinary power, as, for example, an unauthorized competing railroad for which all needed facilities might be obtained by private contract, and without recourse to condemnation or interference with the property of the complaining company. *Penna. R. R. Co. v. National R. Co.*, 8 C. E. Gr. 441; *Rar. & Del. Bay R. Co. v. Del. & Rar. Canal Co.*, 3 C. E. Gr. 546, are apposite illustrations. There the enterprises were enjoined *ab initio*. Where the prohibitory power of this court is invoked to prevent irreparable injury justly apprehended from proceedings under an enactment the constitutionality of which is denied by those who are to be affected by it, it is the manifest duty of the court to enter upon the consideration of the question, and, if the conclusion reached is against the validity of the law, to grant relief; but otherwise if it is merely doubtful whether the law is constitutional.

The complainants have a valuable franchise, under the charter of the company, and have a right to be protected in their enjoyment of it against unauthorized competition. The right to build and use a railroad for public use is a franchise the right to which can be derived from the state alone. Such franchise is, in its nature, and in the absence of express provision to the contrary, exclusive, except against the state, and those invested with a privilege which interferes, by way of competition, with the enterprise, and a competing road established without legislative authority, will be enjoined. *Rar. & Del. Bay R. Co. v. Del. & Rar. Can. Co.*, 3 C. E. Gr. 546; *Pennsylvania R. R. Co. v. National R. Co.*, 7 C. E. Gr. 441.

Said the chief-justice, in the opinion of the court in the first-mentioned case: "A franchise to build a railroad for public use, and to take tolls, is property the title to which is held from the sovereign, and, like every other thing susceptible of private ownership, it must, of necessity, be under the protection of the law. Unless it can be shown that this

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species of right is altogether anomalous in its character, and is under the control of exceptional rules, a wrongful invasion of such right cannot but be followed by a legal vindication. * * * * It seems to me it must be admitted that the rule of law apposite to the matter now in hand, is entirely settled. When, therefore, the complainants obtained from the state the right to establish their road, I think that, by the intrinsic force of such grant, such franchise was exclusive against all persons but the state. A competing road, set up without a legislative license, is a fraud upon such grant, and is a plain public nuisance." See, also, *Edgewood R. R. Co.'s Appeal*, 79 Pa. St. 257.

It is obvious that, under the operation of the general railroad law, the aid of the courts must be accorded to protect those who legitimately enjoy railroad franchises, as well as property owners, against the abuse of the law by those who, under cover of its provisions, illegitimately seek to avail themselves of the extraordinary power which it confers. It is within the province of this court to grant such protection. *Del. & Rar. Bay R. Co. v. Del. & R. Co.*, *ubi supra*; *Bonaparte v. Cam. & Am. R. R. Co.*, *Bald. C. C. 205*; *Giesy v. Cincinnati &c. R. R. Co.* 4 *Ohio St. 308*.

It is undoubtedly within the power of this court (and it is its duty), where an abuse of the general railroad law is attempted by the unlawful application of its provisions to a private use, to restrain the unauthorized proceedings.

On the case as made by the bill and affidavits, the enterprise in question appears to be unlawful. A corporation cannot in its own name subscribe for stock, or be a corporator under the general railroad law; nor can it do so by a simulated compliance with the provisions of the law through its agents as pretended corporators and subscribers of stock.

Though five of the corporators of the National Docks Railway Company, as directors, by their affidavit appended to the articles of association, swear that the amount of the capital stock required by law to be subscribed and paid in

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good faith, has been in good faith subscribed and paid in cash to the directors, and that it is intended in good faith to construct and to maintain and operate the road, and that the whole of the stock (\$300,000) has been subscribed, and \$6,000 thereof paid in good faith to the directors in cash, the president of the Storage Company, by his affidavit put in by the National Docks Railway Company, swears that the Storage Company procured the several corporators and stockholders of the National Docks Railway Company to organize that company, and that it was done in the interest of the Storage Company, which has agreed and expects to advance out of its own funds all the means necessary to purchase the right of way and construct the road. Of the seven corporators, it appears that the majority are either officers or employes of the Storage Company. One is its president, another its treasurer, another an engineer in its employ, another its book-keeper, and another its assistant book-keeper. The stock is divided into 3,000 shares of \$100 each. Of those shares 2,982 were subscribed by the president of the Storage Company, 3 by the treasurer, and 3 by each of the three employes. So that all the stock except 6 shares was subscribed by officers or employes of that company. An attempt by a corporation thus to avail itself unlawfully of the general railroad law to build a railroad will, on complaint of a party injured, be enjoined as an abuse of the law.

But, further, though by a supplement to its charter (*P. L. 1869 p. 893*) power is given to the Storage Company to construct a railroad from its depots to some point on the New Jersey Railroad, between the Hudson and Hackensack rivers, and the power of condemnation is thereby granted, it has not availed itself of the privilege thereby conferred, perhaps because in exercising the power of condemnation it might be met by the objection that the railroad is for private use merely. By the avowal contained in the affidavit of its president, it appears that the projected road, which is to be from its docks to the line of the New Jersey Railroad, is

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merely its own private enterprise; that the seven corporators are merely its agents, and that it is by this device attempting to do indirectly what it could not do directly, and to effect by means of the general law a purely private purpose which it could not effect under the special authority which the legislature attempted to confer upon it by the supplement to its charter. As far as appears, the road is designed to answer no public use, but merely a private one; is to be merely the means by which the Storage Company is to provide transportation for its merchandise from the line of the New Jersey Railroad, across the Central Railroad, to its depots.

The proceedings should be stayed. There should, therefore, be a preliminary injunction.

WILLIAM McMICHAE

v.

JOHN B. BRENNAN and wife and others.

1. An omission of the names of the parties from an unsworn answer, made by mistake of the solicitor,—*Held*, amendable, under the circumstances, after replication and testimony in behalf of the parties for whom it was put in as a mere pleading.

2. A resolution of a corporation authorizing the acceptance of a conveyance of lands on which the corporation held a mortgage, in satisfaction of the mortgage,—*Held*, valid, although no entry thereof was ever made on the minutes, and the secretary did not remember the fact of its passage, it being satisfactorily proved otherwise.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. E. E. Green and Mr. B. Gummere, for complainant.

Mr. S. D. Dillaye, for defendants.

McMichael v. Brennan.

THE CHANCELLOR.

The complainant is the receiver of the Penn Fire Insurance Company, late a corporation under the laws of Pennsylvania, but dissolved in October, 1876, by judicial proceedings in insolvency in the court of common pleas of Philadelphia. He brings this suit to foreclose a mortgage given by Joel R. James and wife to Anthony Smith, dated May 20th, 1873, upon land in Burlington county, to secure the payment of \$3,000 and interest. The mortgage was assigned by Smith, May 30th, 1873, to John B. Brennan by whom it was assigned, June 24th, 1874, to Samuel Prior, who assigned it, October 28th, 1874, to the company. The company, by a deed of assignment made for the benefit of its creditors, dated March 2d, 1876 (but not accepted until the 11th of that month), assigned to the complainant all its property, securities, effects and assets of every description. Subsequently, and in October following, the complainant was appointed receiver in the proceedings before mentioned. By order of the court by which he was appointed, made December 15th, 1876, he, as assignee, transferred all the property and assets assigned to him by the company, to Charles L. Gompert, by assignment dated January 18th following, and Gompert, on the same day, transferred them to him as receiver. The mortgaged premises were conveyed by James (the mortgagor) and his wife, by deed dated June 26th, 1874, to Brennan. The deed purports to convey the property subject to the mortgage, and it contains a covenant on the part of Brennan, assuming and agreeing to pay it. It appears that Brennan and his wife, by deed dated February 29th, 1876, conveyed the property to the company for a nominal consideration, subject to the mortgage which the company thereby assumed and agreed to pay as part of the purchase-money. Mary Raybold, executrix &c. of Joshua Raybold, deceased, on the 17th of February, 1877, issued an attachment out of the supreme court of this state, against the estate of the company, which was executed upon the premises by the sheriff of Burlington, nine days after-

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plaintiff and other creditors of
me in. The bill prays that the
may be established, and an account
that any deed of the premises to
be declared void, and be cancelled;
the attachment may be declared of no
effect, and James and his wife may be decreed to pay
the amount due on the mortgage;
in default thereof, a foreclosure and sale may take
place, and Brennan may be decreed to pay any deficiency.
The bill prays answer without oath.

There are two answers. One is by Brennan, and the
other is by the company. The answer of the company
seems to have been put in by defendants impleaded
in the bill, but the names of those by whom it was put
in are omitted, manifestly by mistake. The answer of
the company sets up the deed to the company as a merger
of the mortgage, and denies his liability under the assumption
in the deed from James to him, alleging that he
was, in fact, was the owner of the property, and was
not aware that a conveyance of the premises had been
made to him until after it was done, and that he conveyed
the property to the company at the request of the agent of
the company, and merely because he was informed that the
title stood in his name on record, though he disclaimed any
ownership of the property.

The other answer, among other things, sets up the deed
to the company, and insists upon the validity of the
attachment and claims, for the plaintiff therein, and the
other creditors who have come in thereunder, the benefit
of it. To that answer, as well as to the answer of Brennan,
a replication was filed. To the former the replication is
entitled as the "replication to the joint answer of defendants
to the bill &c." An appearance was entered in the cause
for the plaintiff in the attachment and the creditors who
applied thereunder, by the solicitor by whom that answer is
signed, and it is extremely probable that the answer was

McMichael v. Brennan.

intended to be theirs. A decree *pro confesso* was entered against them several months before the filing of the replication. No objection is made to the answer, however, on the ground that it was filed irregularly, but it is insisted by the counsel of the complainant that it should, for the defect before mentioned, be disregarded as being a mere nullity.

The call of the bill for answer being for an answer without oath, and the evidence adduced to support that answer having been admitted without objection, so that the attention of the solicitor of the defendants for whom the answer was put in was not drawn to the fact that the names are not in the answer until the hearing, and the answer being in this case a mere pleading, an amendment would, under the circumstances, be permitted.

But the view I take of the case renders it unnecessary to deal with any matters except those set up in the answer of Brennan. If the deed to the company is held to be valid, the bill must be dismissed. That deed is proved to have been in the possession of the company when the receiver was appointed. It is brought into court by him. It is proved to have been obtained by an agent of the company on application to Brennan, and a request on the part of the agent to him to execute it in order to give the company absolute title to the property. The authority of the agent is fully proved. The passage of a resolution by the board of directors, giving authority to take the deed, is shown, and the contents of the resolution are proved. That it cannot be found in the minutes, and the secretary does not remember that it was passed or offered, cannot countervail the positive testimony of the president and two other members of the board, and the attorney of the company (it was drawn by him), that it was adopted. The deed itself is corroborative of their testimony. And so is the fact of the payment of the bill of the agent (who was a conveyancer), for his services and disbursements in obtaining other deeds under the resolution, and his recovery of a judgment against the company for

Hardenbergh v. Converse.

his compensation and disbursements for obtaining the deed from Brennan with some other deeds.

The president swears that he gave the agent authority to get the deed from Brennan. Nor is there any proof whatever to the contrary. That the secretary should not, at the distance of over two years and a half from the time of the meeting, recollect a resolution which, probably, was not entered on the minutes, because it escaped his notice, is not surprising. Not only is there no proof of fraud, but there is no ground for any imputation of fraud, nor is any fraud alleged. The action of the board in the matter appears, it may be remarked, to have been careful, circumspect and very judicious. It was not only in accordance with the advice of the company's counsel, but it was manifestly strictly in accordance with the interest of the company.

The bill will be dismissed, with costs.



AUGUSTUS A. HARDENBERGH and others, executors,
v.

MARY M. CONVERSE and others.

Under the charter of Jersey City, the lien of mortgages is subject to that of taxes and assessments for improvements subsequently laid.

Bill to foreclose. On general demurrer by the mayor and aldermen of Jersey City.

Mr. L. Zabriskie, for complainants.

Mr. L. Abbett, for demurrants.

THE CHANCELLOR.

The bill is filed to foreclose a mortgage given in 1866, on real property now in Jersey City, but then in what was, at

Hardenbergh v. Converse.

that time, known as the town of Bergen. It states that in 1872, 1873, 1874, 1875, 1876 and 1877, the mayor and aldermen of Jersey City levied and assessed against the mortgaged premises certain specified sums for annual taxes, and that in 1873 the premises were sold to the city treasurer of Jersey City, for the benefit of the corporation, for \$264.59, for unpaid taxes assessed against the premises by the mayor and aldermen of Jersey City, and due in November 1871; that in May, 1875, the corporation assessed the premises to the amount of \$595, for benefits thereto on account of the extension and opening of Wayne street, which assessment, however, the bill states, the complainants are informed, has been set aside or suspended, in order that a new assessment might be made; and, also, that in 1878 the premises were assessed, by or under the authority of the corporation, for the sum of \$1,159, for benefits to the premises on account of the improvement of Wayne street. It charges that the liens claimed by the corporation upon the premises for those taxes and assessments, having been made and created subsequent to and under laws that were passed and went into effect after the making of the mortgage, are subsequent to the lien of the mortgage; and, further, that by the terms of the laws authorizing them, those taxes and assessments are not made liens upon the premises, except subject to the complainants' mortgage, and that if, by the provisions of such laws, they are prior liens, the laws are, for that reason, unconstitutional and void. It prays that the defendants may be required to pay the complainants' mortgage, and, in default thereof, may be foreclosed. The city has filed a general demurrer.

The question is, whether the lien of those taxes and assessments is prior to that of the complainants' mortgage. As before stated, when the mortgage was given, which was in 1866, the premises were in what was then known as the town of Bergen. By the act of incorporation of that town it was provided (*P. L. 1864 p. 412*) that all taxes and assessments which should thereafter (the act was approved

Hardenbergh v. Converse.

March 24th, 1864) be levied, assessed or made upon any lands, tenements, hereditaments or real estate situate in that town, should be and remain a lien thereon until paid, notwithstanding any devise, descent, alienation, mortgage or other encumbrance thereon, and that for non-payment of tax or assessment the land might be sold for the shortest term for which any person would agree to take it and pay the tax or assessment, or the balance thereof remaining unpaid, with the interest thereon, and all costs, charges and expenses. It was also provided that no mortgagee whose mortgage should have been duly recorded before sale for tax or assessment, should be affected by the sale unless six months' notice, in writing, should have been given to him by the purchaser, or those claiming under him. Under that act the lien of tax or assessment was prior to that of any mortgage upon the premises. *Trustees &c. v. Trenton*, 3 Stew. 667. By the charter of the city of Bergen (*P. L. 1868 p. 314*), approved March 11th, 1868, a like provision for the assessment and lien and collection of taxes was made. And so, too, by the act to consolidate into one city the cities of Jersey City, Hudson City, Hoboken and Bergen, the town of Union, and the townships of North Bergen, Union, West Hoboken, Greenville, Bayonne and Weehawken, and part of the township of Kearney, approved April 2d, 1869 (*P. L. 1869 p. 1377*). The like provision was made by the act to re-organize the local government of Jersey City, approved March 31st, 1871 (*P. L. 1871 p. 1095*). The lien of the taxes and assessment mentioned in the bill is, therefore, prior to that of the complainants' mortgage. This case is governed by the decision in *Trustees &c. v. Trenton*, above cited.

The complainants' counsel insists that the case is distinguishable from that, because, as he claims, the charter of Jersey City, of 1871, provides for the assessment of taxes upon personal estate in that city in a manner different from the general tax law of the state, and does not make provision for the deduction from the valuation of the real and

Scudder v. Harden.

personal estate of any individual to be assessed, of debts *bona fide* due and owing from him to creditors residing in this state. But by force of the provision of the constitution of this state, as amended, that property shall be assessed for taxes under general laws and by uniform rules, according to its true value, so much of the charter of Jersey City in respect to the levying of taxes as was special, was abrogated. That provision, *proprio vigore*, repealed it. *State, North Ward N. Bank pros. v. Newark, 11 Vr. 558.* And the charter, as far as those special provisions are concerned, stands as if they had been repealed at the time of the adoption of the amendment.

The demurrer will be allowed.

WILLIAM C. SCUDDER

v.

JACOB M. HARDEN and others.

Where a building contract was duly filed, and, after the building was completed, the premises were *bona fide* conveyed by the owner to the contractor,—*Held*, that a materialman has no lien on the premises for materials furnished in erecting a building thereon, and that a judgment recovered on such claim gives no greater right.

Bill to foreclose. On final hearing. Submitted on written statement of counsel in briefs.

Mr. S. H. Grey, for complainant.

Mr. C. V. D. Joline, for defendant Coles.

THE CHANCELLOR.

The building on the mortgaged premises was erected, under written contract duly filed, by the defendant Jacob M. Harden for Joseph J. Read, the owner. After it was

Scudder v. Harden.

finished the property was *bona fide* sold and conveyed by Read to Harden. Some months after that transaction Harden *bona fide* mortgaged the property to the complainant. Subsequently to the giving of the mortgage, the defendant Coles, who furnished materials to Harden for the building, filed a lien claim, under the mechanics lien law, against Harden and the property, and recovered a special and general judgment thereon. He insists that his judgment is entitled to priority over the complainant's mortgage.

The second section of the mechanics lien law provides that when any building shall be erected in whole or in part by contract in writing, such building, and the land whereon it stands, shall be liable to the contractor alone, for work done and materials furnished in pursuance of such contract; provided such contract, or a duplicate thereof, be filed in the office of the clerk of the county in which such building is situated, before the doing of the work or the furnishing of the materials. The contract in this case was, as before stated, in writing, and was duly filed in the clerk's office. The materials for which the lien was filed were furnished after the filing of the contract. The conveyance to the contractor extinguished the lien. The property was liable to him alone. The materialman had no right to a lien. When the complainant took his mortgage there was no liability to lien for either the work or materials. Coles, the lien claimant, had no claim of lien before the conveyance to Harden, and the fact of that conveyance gave him none. The lien given by the mechanics lien law is entirely the creature of the statute. It will not be extended by construction to a case which is not fairly within the terms of the act. *Phillips on Mech. Liens* § 9.

In *Ayres v. Revere*, 1 Dutch. 474, it was said by the supreme court that the statute is not of that purely remedial character which calls for a peculiarly liberal construction.

The complainant's mortgage is entitled to priority over Coles's judgment.

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Hance v. Conover.

GEORGE C. HANCE and others

v.

WILLIAM W. CONOVER and others, executors.

Where remaindermen interested as such in personal property under a will of which the life tenant was executor, made no objection in his life-time to his inventory of the estate, but came into court after his death and four years after he filed the inventory, seeking to charge his estate with securities not in his inventory,—*Held*, that they were, under the circumstances, barred by their laches.

Bill for relief. On final hearing on pleadings and proofs.

Mr. Abel I. Smith, for complainants.

Mr. R. Allen, for defendants.

THE CHANCELLOR.

The object of this suit is to surcharge the inventory made and filed by Robert H. Hance, deceased, as executor of his wife. By her will, she gave the use of all her property to him for life, with provision that if he "should desire, after her decease, to use more than the interest of her estate, or what might accrue from the interest of her estate, real or personal, he might use so much of the principal as he might deem proper for his necessary and comfortable use." She died June 6th, 1872. On the 18th of that month he proved the will, and, subsequently, filed an inventory, making affidavit thereto on the 13th of July, 1872, that it was a true and perfect inventory of all and singular the goods, chattels, and credits of the testatrix which had come to his knowledge or possession, or to the possession of any other person or persons to his use. The articles in the inventory are wearing apparel, household furniture, some silver plate and a bond and mortgage for \$1,000 and interest thereon, valued altogether at \$1,305.85. Mr. Hance died in September

Hance v. Conover.

1876, testate. The bill is filed by persons interested in the estate of Mrs. Hance under her will, and seeks to obtain from the executors of her husband an account of government bonds to the amount of \$3,300, gold coin to the amount of \$1,500, and other moneys, goods, chattels and effects, to the amount of \$5,000; in all, \$9,800, which it alleges Mr. Hance received from his wife's estate, and which he did not put in the inventory, and for which he has never, in any way, accounted. The case shows no effort to prove any of those items except the government bonds, and, as to them, the proof is of a character so entirely unsatisfactory as to forbid that a decree should be made for an account in respect to them. There is no proof that Mrs. Hance ever bought any government bonds, and none that she ever owned any. Among her husband's papers were found, after his death, two slips of paper purporting to be memoranda of government bonds owned by her and him respectively. It appears, too, by the books of the bank where the bonds which he controlled were left for safe keeping by him, that a distinction was made, up to the time of her death, in the entry to the credit of Mr. Hance of the money received for the coupons which the bank collected for him, her christian name, or an abbreviation thereof, or its initial letter, being, from time to time, written opposite the entry of the proceeds of part of the coupons. It also appears that before her death he kept the bonds on which the interest was collected by the bank, in two separate envelopes there, one marked with her name and the other with his. But it does not appear that she ever received any of the interest from the bonds, or any of the money entered in her husband's bank account to his credit. Nor does it appear in any way that she ever claimed to own those bonds, or any of them, or to have any control whatever over them, or any right to them, or to the interest thereon.

For aught that appears, the bonds were all his, though part of them were kept in an envelope marked with her name. There is no proof when the memoranda before

O'Neill v. Dringer.

mentioned were made. It is suggested by the complainants' counsel that they were made in or about 1870. The person who made them is produced, but he can give no account of them. He does not know for whom or by whose direction they were made, nor can he tell under what circumstances they were made. He was the cashier of the bank, but he distinctly testifies that he only knew Mr. Hance in connection with the bonds, and that Mrs. Hance never did or said anything in reference to them, though she sometimes accompanied her husband to the bank when he came to attend to business in connection with them, but on those occasions she remained outside in the carriage. Whether she ever owned the bonds at all, or, if she owned them, whether her husband bought them of her, or she gave them to him in her life-time, are questions the answers to which must be left to conjecture. It is enough to say that there is not sufficient evidence to charge the estate of her husband with the value of any government bonds as received by him from her estate. The inventory was filed by him in July, 1872. He did not die until September, 1876. The persons interested in remainder under her will, had abundant opportunity in the four years to except to the inventory, and to make inquiry by judicial proceedings into the honesty of it. They have left the matter until his death, and they must, under the circumstances, accept the disadvantages of the situation.

The bill will be dismissed, with costs.

CHARLES O'NEILL

v.

SIGMOND DRINGER and others.

Where a municipal charter does not directly declare that taxes shall be a lien paramount to mortgages on the lands assessed, such priority cannot be claimed from the mere fact that the charter allows mortgagees to redeem the premises after a tax sale.

O'Neill v. Dringer.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. Geo. S. Hilton, for complainant.

Mr. J. W. Griggs, for the city of Paterson.

THE CHANCELLOR.

The question presented for consideration is, whether, under the provisions of the charter of the city of Paterson (where the mortgaged premises are), the taxes which have been imposed since the giving of the complainant's mortgage, and are still unpaid, are a lien paramount to that mortgage. They were levied under the existing charter of the city, which was passed in 1871 (*P. L. 1871 p. 808*). The assessments were in the name of the mortgagor, who was, when they were made, in possession of the property, and was the owner of the equity of redemption. By the 40th section of the charter it is provided that the commissioners of assessment and revision shall divide the city into assessment districts, and proceed to make a full and fair valuation, enumeration and assessment of all the taxable property, real and personal, in the city (but mortgages on such property shall not be taxed in the hands of any person in this state), fixing upon the property such a value as would be fixed upon it by a creditor and solvent debtor on receiving and delivering it in payment of a fair and just debt due to the one from the other. By the 46th section it is provided that any assessment or levy of taxes made after the approval of the charter, against any person, firm, company or corporation, on account of any lands, tenements, hereditaments or real estate of such person, firm, company or corporation, shall be and remain a lien on all the property on account of which the assessment is made, with twelve per centum interest thereon accruing, and all costs and penalties in relation to such assessments and the collection thereof, from the time when the taxes so

O'Neill v. Dringer.

assessed were payable. By subsequent sections it is provided that in case of non-payment of the taxes, the land may be sold for a term not exceeding fifty years. The 57th section provides that the purchaser shall, within two months after receiving the certificate of sale, give notice to the owner or owners of the property (or, if unknown, or his, her or their address cannot be ascertained, then the notice is to be served on the principal occupant of the property, if it be, in fact, occupied), where, by whom and for what term the property was bought, and when and at what expense it may be redeemed. The next section (the 58th) provides that at any time within twelve months after the issue of the certificate of sale the owner, mortgagee, tenant or any person having a legal or equitable interest in the property, or his, her or their agent or attorney, may redeem the property by paying to the receiver of taxes the money paid for the property, &c. The 59th section provides that, if the property be not so redeemed within the twelve months, the receiver of taxes shall deliver to the holder of the certificate a deed for the property, and that any person or persons, his, her or their legal representatives, to whom such deed shall be delivered, shall, by virtue thereof, be entitled to possession of, and shall hold and enjoy the property during the term for which he, she or they shall have purchased it, for his, her or their own proper use and benefit, against the owner or owners thereof, and all and every person or persons claiming under him, her or them, until the term for which he, she or they shall have purchased the property shall be fully completed and ended.

It will be seen that the provision of the charter by which taxes are made a lien upon the property on account of which they are assessed, is the same as that (part of a special law in that case) which was passed upon in this court in *Hopper v. Malleson's ex'rs*, 1 C. E. Gr. 382, and the provision of the general law which was adjudicated upon in *Morrow v. Dows*, 1 Stew. 459. The provision as to the

O'Neill v. Dringer.

estate which the purchaser at a tax sale is to have, is also the same. The only difference is that in the charter there is a provision for redemption not only by the owner, but by a mortgagee, tenant, or any person having a legal or equitable interest in the property. There was no provision for redemption in the special law, and in the general law the right to redeem was given to the owner or owners only. The decisions in those cases govern this. It is insisted, however, that the provision for redemption by the mortgagee, tenant &c., in the charter, is strong evidence that the legislature intended to make the taxes a lien upon the interest of the mortgagee, and to bind that interest accordingly to the payment of the tax, but it is to be remarked that, though the charter provides for notice after the issuing of the certificate of sale, it is for notice to the owner or owners only. There is no provision for notice to the mortgagee. He, as well as a tenant or any other person having a legal or equitable interest in the property, may redeem, but the fact of the existence of that privilege does not lead to the conclusion that the legislature intended to bind the mortgagee's interest in the land to the payment of the tax.

In *Campbell v. Dewick*, 5 C. E. Gr. 186, it was held that under a charter of the city of Elizabeth the estate of a mortgagee was bound under such a provision for lien as is contained in the charter under consideration, for the tax assessed on account of the mortgaged premises; but the charter provided that no mortgagee should be divested of his rights in the property unless six months' notice, in writing, of the sale for taxes, had been given to him by the purchaser. To hold that, under the charter of Paterson, the interest of the mortgagee in the property is liable for the tax, is to hold that he is liable to be divested of his interest without notice. The charter provides for notice to the owner after the sale, before his estate can be divested, although the assessment is against him, and the tax has, it may be, been left unpaid by him willfully; but it does not provide for any notice whatever to the mortgagee. It

Iszard v. Mays Landing Water-Power Co.

simply gives him the right to redeem. This privilege of redemption is no evidence that the legislature intended to make the tax a lien on the mortgagee's interest, but merely that it intended that he, having an interest in the property, might, if so disposed for any reason, put an end to the tax title. The charter of Trenton, which was the subject of adjudication in *Trustees &c. v. Trenton*, 3 Stew. 667, contains, it may be remarked, a provision that, before the rights of a mortgagee can be divested by a tax sale, he must have notice, and it provides not only, also, that he may redeem, but that if he redeems he shall have a lien upon the property for the money paid, and interest, and may recover it as if it had been included in his mortgage.

The complainant is entitled to priority over the city.

ABRAHAM L. ISZARD

v.

THE MAYS LANDING WATER-POWER COMPANY and others.

1. Under a grant of the use of water for a certain purpose, with a prohibition against certain other uses specified, the grantee may use it for any purpose not prohibited.

2. Under the circumstances,—*Held*, the grantor in such a case had no right to entirely cut off the supply of water from the grantee on an alleged violation of his covenant regulating its use.

3. Damages for loss of the use or custom of a mill previous to filing the bill, are recoverable at law, and cannot be allowed in a suit for the specific performance of the contract to supply water to such mill.

Bill for specific performance. On final hearing on pleadings and proofs.

Mr. William E. Potter, for complainant.

Mr. Peter L. Voorhees, for defendants.

Iszard v. Mays Landing Water-Power Co.

THE CHANCELLOR.

By an act of the legislature approved March 4th, 1846 (*P. L. 1845 p. 51*), Jeremiah Stull was authorized to construct a dam across the Great Egg Harbor river at May's Landing, in the county of Atlantic, for the purpose of creating a water-power for the benefit of such mill or mills or other water-works for manufacturing or other purposes as should be thereafter erected by him, his heirs or assigns, or any other person or persons or bodies corporate to whom he or they might thereafter let, sell or lease any water-power, right or privilege; and he and they were empowered to use the power for such purposes forever thereafter. He subsequently, under the power conferred by the act, constructed the dam. He was then the owner in fee of certain land there adjacent to the land of the complainant, and lying between the complainant's land and Stull's dam and pond. After the construction of the dam and the creation of the water-power by means thereof, Stull, on the 14th of April, 1847, executed and delivered to the complainant a deed whereby it was, among other things, recited that the complainant had purchased of him a water-power right or privilege in the dam, with certain conditions and reservations thereafter named and particularly set forth, for the purpose of driving the fan of a cupola furnace; and Stull thereby, for himself, his heirs, executors, administrators and assigns, in consideration of the annual payment of \$60 thereby agreed to be paid by the complainant, granted to the latter, his heirs and assigns, a certain water-power right or privilege, under the act of the legislature, as follows: Two hundred and seventy-five square inches of water to be taken from the fore-bay of the grist-mill of Stull, which was supplied with water by means of the dam, together with the privilege of digging and cutting a trench across Stull's land, and of placing in the ground beneath the surface there, a trunk to carry the water from the fore-bay of the grist-mill to and upon the land of the complainant, where the cupola furnace was to be built; and in case the two

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hundred and seventy-five square inches of water should be insufficient to drive the fan of the cupola furnace, the complainant was, if he should put up a well-constructed water-wheel for the furnace, to have an additional supply from the fore-bay of the grist-mill sufficient to drive the fan by means of the trunk, without any additional payment, and he was to have the privilege of, at any time, repairing the trunk or putting in a new one across the lands of Stull to his land. And Stull thereby agreed to have and keep a sufficiency of water, at all times, in the fore-bay of the grist-mill to supply the complainant, his heirs and assigns, with the two hundred and seventy-five square inches of water; and, in case that should not be sufficient to drive the fan of the cupola furnace, such additional amount as would be sufficient for the purpose. And the complainant thereby covenanted that he would put in a well-constructed water-wheel for the cupola furnace, and that he, his heirs, executors, administrators and assigns, should not and would not use any of the water for the purpose of driving a grist or merchant-mill, or an oakum-mill or factory for the manufacture of oakum.

The parties bound themselves, each to the other, in the penal sum of \$10,000 for the true performance of all and every of the covenants and agreements contained in the deed. The deed was acknowledged on the day of its date as a deed of conveyance of real estate, according to the statute, and was recorded on the same day in the clerk's office of the county of Atlantic. Immediately after the execution of the instrument, the complainant, pursuant to the terms thereof, dug a trench across the land of Stull, and put a trunk therein, for the purpose of conveying water from the mill-dam to his lands, and constructed a fore-bay, and put in a water-wheel there. The trunk was originally made of the dimensions of two feet by four feet, and was four hundred and sixty-two feet long from the fore-bay of Stull's mill to the complainant's fore-bay, immediately over his water-wheel. The latter fore-bay was built three feet five inches in width by thirteen feet in length in the clear.

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and a water-wheel of the kind known as Dripp's all-pressure water-wheel, was put in place there. The trunk and fore-bay were constructed and the wheel put in place under the direction of an experienced and skillful millwright, and an aperture was carefully cut by him as a test of the amount of water flowing over the wheel when in full operation, by which it was shown that the amount of water used was two hundred and seventy-five square inches, and no more. During the construction of these works, Stull was frequently present and inspected and examined them, with a view to ascertaining whether they conformed to the agreement, and he appears to have been satisfied with them. After they were completed, the complainant used the water conveyed through the trunk (and paid the consideration according to the agreement) so long as Stull continued to be the owner of the dam and water-power, with Stull's consent, and without any objection on his part, and continued to use the water by means of his works up to the 5th of September, 1872, when it was entirely cut off by the defendants.

From the year 1861 to 1870, the complainant ceased to operate his furnace, but paid the \$60 a year to the owners or possessors of the mill-seat and power, according to the terms of the agreement. About the 1st of May, 1870, he took down and removed the cupola of his furnace, and constructed a saw-mill there, to be driven by the same water-power which he had previously used in driving the fan. Immediately before he started the saw-mill he relined and repaired the trunk, at an expense of about \$1,000. No objection was, at any time, made by the owners of the Stull property to his use of the power for the saw-mill until about the time when the water was cut off, as before-mentioned, in 1872. The power was so used for the saw-mill, without objection, for about two years.

On the 5th of September, 1872, the defendants (the defendant company had, previously thereto, and in 1867, become the owner of the Stull property) effectually cut off,

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on the premises of the defendant company, the water from the complainant, and subsequently, by means of a solid stone wall, permanently prevented the water from running into the complainant's trunk, and ever since have deprived him of the use of it. Up to the time when the water was cut off, the complainant paid the \$60 a year, according to the agreement. By his bill, he prays that the company may be decreed specifically to perform the agreement, and to re-admit the flow of water from its fore-bay and mill-seat into his trunk, according to the true intent and meaning of the agreement, and to pay him the damages he has sustained by its cutting off the water.

The defendants, by their answer, insist that the only right granted to the complainant was the right to use the water to drive the fan of the cupola furnace, and that he could not lawfully apply the power to any other purpose; that the measure of the grant was two hundred and seventy-five square inches of water, and no more, that amount being sufficient to drive the water-wheel and fan of the cupola furnace when in operation; and they allege that the company has at all times claimed, and has repeatedly notified him before he built his saw-mill, as well as afterwards, that he had no right to use the water under the agreement for any other purpose than for driving the fan, and that he had no right to use the water to drive a saw-mill, and that any attempt to use it for the latter purpose would be resisted and contested by the company. They allege that he used far more than two hundred and seventy-five square inches of water, and as much as four hundred and fourteen, for his mill, and that he also drew from his trunk or fore-bay water for domestic and other purposes, for himself and others, and that his trunk and fore-bay were decayed and leaky, and wasted water. They also allege that, having complained to him without effect, of his unlawful use of the water, they informed him, by letter dated August 29th, 1872, that they had ordered his supply to be cut off until the amount of water used by him should be reduced to two hundred and

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seventy-five square inches, and until the use of the water for domestic purposes by him and others should cease, and his flume be repaired; and that having so notified him, and he not having complied with their request to cease from the unlawful use of the water, they cut it off.

The case presents the following questions: First, whether the complainant, under the agreement, is entitled to the use of the water for any other purpose than to drive the fan of a cupola furnace; second, whether, if he was at liberty to use it for the saw-mill, the company was, under the circumstances, justified in cutting it off; and, third, whether he is entitled to an assessment of damages in this suit for the breach of the agreement.

As to the first question: Under a grant of the privilege of sufficient water to propel certain specified machinery, the grantee is entitled to the use of the water for any purpose not requiring a greater power than is reserved. *Ang. on Watercourses* § 149a; *Luttrell's Case*, 4 Coke 86.

In *Ashley v. Pease*, 18 Pick. 268, cited by the defendants' counsel as an authority to the contrary, the grant was of so much water as might be necessary to carry on and supply the fulling-mill then standing, or which might thereafter stand, upon the lot granted. The court held that it was manifest, from the general tenor of the contract, that it was the intention of the parties that the grant should be limited to the use of the water for driving the fulling-mill, and that the use of it for a carding-machine was unauthorized.

The best judicial construction of such a grant as that under consideration, is, it was said by Chief-Justice Gibson in *Schuylkill Nav. Co. v. Moore*, 2 Whart. 477, that which is made by viewing the subject as the mass of mankind would view it, for it may be safely assumed that such was the aspect in which the parties themselves viewed it, and the result thus obtained is exactly what is obtained from the cardinal rule of intention.

While in the present case the grant was of water for the purpose of driving the fan of a cupola furnace, there is

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nothing in the agreement to indicate that it was the intention of the parties to confine the use of the water to that particular purpose. On the other hand, there is evidence to the contrary in the covenant on the part of the complainant not to use it for driving a grist or merchant-mill or an oakum-mill or factory for the manufacture of oakum. Such particularity of exclusion would, of course, have been unnecessary if it had been intended by the parties to confine the use of the water to the driving of the fan of the cupola furnace.

The complainant, and those who claim under him, are entitled to use the water for any purpose except that against which he has particularly covenanted. He and they cannot lawfully use it for the purpose of driving a grist-mill, or a mill for the manufacture of flour for sale (called a merchant-mill in the agreement), or an oakum-mill or a factory for the manufacture of oakum, but for any other mill or purpose he and they may use the water on condition of paying the annual sum specified in the agreement.

The defendants, although they knew of the building of the complainant's saw-mill and the purposes for which it was designed and of his intention to drive it by means of the water under the Stull grant (and it appears that almost a year was occupied in building it), do not appear to have made any objection to such use of the water by him until the fall of 1872. And the mill was driven for more than two years by that water, to the knowledge of the defendants, before the water was cut off, and the company annually received the compensation for such use of the water under the agreement. Indeed, it appears that the mill was driven by the water for two years before any question was suggested as to the complainant's right to use the water for the purpose. There clearly was acquiescence in his construction of the agreement.

It appears, by the letters put in evidence on the part of the defendants, written by the treasurer of the company to the complainant in the summer of 1872, that while the com-

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pany then questioned his right to apply the water to the purposes of a saw-mill, they even then did not deny it. Mr. Wood, by whom the letters referred to were written, testifies to a conversation which he had with the complainant in the spring of 1872, before the water was cut off, which was in the fall of that year. He says that, in that conversation, the complainant claimed that he did not take more than the two hundred and seventy-five square inches of water, but that if he did do so he had a right to do it. He says that this is the only conversation that he remembers to have had with him; that he began the conversation by telling the complainant that he thought that he was taking more water than he was entitled to, and he adds that the conversation was with reference to the amount of water, and that nothing was said about the use of the water for domestic purposes; that he (Wood) was not aware of the fact of its being so taken at that time. It will be seen that, in this conversation, the right of the complainant to use the water for the mill was not even questioned. George Wood, the president of the company, testifies that in 1876, four years after the cutting off of the water, he told the complainant that the company would want some kind of settlement as to what his rights were under the lease, but would prefer, if possible, upon ascertaining his rights, to terminate the grant entirely by a compensation to him.

In a letter dated July 29th, 1872, written by Edward R. Wood, the treasurer of the company, he says that he understood from what the complainant said to him, referring to a previous conversation, that the complainant considered that he was entitled to something more than that which appeared to be the strict construction of Stull's grant; and he adds: "Supposing your claim to be correct, it becomes important for the water-power company to understand what the amount of it is. Perhaps the first and simplest step would be for me to come down some afternoon when you can let the saw mill stop for an hour or two, so that we can have time to inspect, together, your flume and the opening throu/

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which it discharges." It will be perceived that the only real question suggested by that letter is as to the amount of water which the complainant was entitled to use. In a letter written by the same person, in the same capacity, dated August 5th, 1872, he says: "I fear I did not express my meaning clearly, if you understood me to make a positive statement about the matter either way. All I want is to get at all the facts in the case, and then have our respective rights set down so clearly that, when we are dead and gone, our children may have no doubt or misunderstanding about it. I hope to be down next week, and, if you are not at home, will avail myself of your permission to inspect the outflow of your flume." In a letter written by him on the 29th of the same month, he says: "Availing myself of your permission, I yesterday inspected your water-wheel and found that the orifice through which the water passes to the wheel measures two feet in height and four feet in breadth, making eleven hundred and fifty-two square inches. I also learned that you drew water out of the flume for household purposes and supplied other persons in the same way. I also noticed that your flume leaks in several places, both on our property and your own. The directors of the Mays Landing Water-Power Company consider these points of so much importance that they are compelled to notify you that they have ordered your water supply to be cut off until you shall have them rectified. This is without any reference to the other question, whether or not your case allows of your using the water for any other purpose than to blow the fan of the cupola furnace. Please take notice that the water will be cut off from your flume until the orifice is reduced to two hundred and seventy-five square inches and until the domestic supply be broken off and the flume repaired." In none of these letters, as before remarked, is the complainant's right to use the water for the saw-mill denied.

As to the second question: It appears from the evidence that, as before stated, very soon, if not immediately, after

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grant was made (which was in 1849), the provision for conveying the water from Stull's premises to the place nose of the complainant where it was to be used, was not only with care and under skillful direction and supervision, but also practically under the inspection of all himself, and that he was satisfied that that provision was in conformity with the grant both as to the quantity of water and otherwise. The same provision remained and was in use from 1849 until the breaking out of the war of the rebellion, in 1861, a period of about twelve years. In 1870 the complainant repaired and relined the flume. From 1849 to the spring of 1872 he appears to have claimed the right to use, and to have used for fourteen years of the time, or thereabouts, the water to the same extent as provided for originally and that, too, without question or objection on the part of Stull or any of those who claimed under him.

In *Society for Establishing Useful Manufactures v. Holsman*, 1 Hal. Ch. 126, the complainants had sold a lot, in 1813, in the city of Paterson, with the right of taking from their canal twelve inches square of water. A mill was shortly afterwards erected on the lot and water was drawn from the canal for supplying it, without the use of any means for accurately measuring the quantity drawn. In 1827, fourteen years after the grant was made, the complainants gave notice to the owner of the mill that they had reason to believe that he was taking more than the stipulated quantity of water, and requested him to confine his future use of water within the terms of the grant. He replied that he was not using more than the foot of water. Again, in December, 1843, the complainants gave a like notice to him and made a like request, but he did nothing to limit the flow. In 1844 the complainants built a stone wall in their canal, opposite the head-race leading the water on the lot, and placed in the side of the wall a piece of cast-iron with an aperture in it of twelve inches square for the flow of water into the head-race, and thereupon the owner of the mill prostrated the wall. This court denied a motion for

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preliminary injunction restraining the owner from taking more water than would run through an aperture of twelve inches square, or from pulling down or taking out any gauge which the society might insert for the purpose of measuring twelve inches square of water. The chancellor (Halsted) appears, by the opinion, to have denied the complainants' application for a preliminary injunction upon the ground that the condition of affairs complained of had existed for thirty years, and that it had continued for eighteen years or thereabouts after the complainants made objection to it by notice, and he appears to have been inclined to the opinion that, though the quantity used should turn out to be more than that which was stipulated for by the grant, yet that the defendant was entitled to it from long user.

In the present case there is an important circumstance already adverted to once or twice, that the provision for taking the water was made under the inspection of the grantor himself, and that it has continued unchanged ever since. It appears from the evidence that, after the trunk was relined in 1870, the amount of leakage was very small. When the complainant began to run the saw-mill, in May, 1870, he found that the trunk leaked, and he thereupon stopped the mill to repair the trunk, and relined it at an expense of about \$1,000. Among other witnesses, Russell D. Green, the superintendent of the company, testifies that after the trunk had been relined it did not, he thinks, leak, except in one place, the corner of the grist-mill. George Wood, the president, speaks of the leaks, referring to each of them in particular, and it appears from his testimony that they were of comparatively little importance. And it appears that in a conversation which Edward R. Wood had with the complainant in the spring of 1872, before the water was cut off, no mention was made of the leaks, but only of the quantity of water which the complainant claimed the right to use. In this connection, reference may be appropriately made to the use of water for domestic purposes, mentioned in one of the letters.

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his use of the water, by the complainant and others, appears to have been by virtue of a verbal license from himself, which was never revoked, as far as appears by the testimony, until the letter of August 29th, 1872, which, it may be stated, was not received by the complainant until after the water was cut off. In that letter the writer says (referring to the day, before the date of the letter, on which he had inspected the water-wheel &c., by permission of the complainant) he had learned, apparently for the first time, that the complainant drew water out of the flume for household purposes, and supplied other persons in the same way. But if it be conceded that the evidence shows that the complainant was using, at the time when the water was cut off, more water than he was lawfully entitled to, the action of the company in cutting off the water, and depriving him entirely of the use of it, was unjustifiable. It had a remedy, by action at law for the recovery of damages, for any injury which had been inflicted upon it by his unlawful use of the water. It does not appear that it was subjected to any inconvenience, even, by reason of such alleged excessive use. According to the letters, an adjustment of the rights of the parties under the grant was all that the company was seeking. There was, therefore, no necessity for cutting off the water to protect itself. When the complainant went to the company's premises to remove the obstruction which it had placed there to the flow of the water into his trunk, the company resisted him by, at least, a show of force, and compelled him to retire. It subsequently proceeded to build a stone wall, which effectually and permanently prevented the flow of the water into the trunk. Its action deprived him of the motive power for his mill, and rendered that property almost, if not wholly, worthless. The object of the company appears to have been, to a certain degree, at least, judging from the evidence, to extinguish his lawful right, and not to protect itself against his unlawful use of the water. Although four years elapsed from the time when the water was cut off, before the bill i

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this cause was filed, that delay, long as it is, does not disentitle the complainant to relief.

The existence of the grant is not denied. That it is binding upon the company, provided the complainant is, under it, entitled to use the water for a saw-mill, is not questioned. By the answer, the company says that, ever since it became seized and possessed of the water-power and property, it has been at all times, and still is, ready and willing to keep the agreement, according to the true intent and meaning thereof, and at all times to furnish to the complainant the two hundred and seventy-five square inches of water for the purpose of driving a fan to a cupola furnace.

The complainant is entitled to a decree requiring the company to restore to him the privilege of the grant. It should be required to remove the obstruction from the flow of the water into the trunk as it was accustomed to flow at the time when it cut off the water.

The complainant claims, by his bill, and his counsel insisted upon the hearing, that he is entitled to receive at the hands of this court, by a decree in this suit, damages for the breach of the agreement. As before stated, for four years before this suit was brought, his mill stood idle for want of the water-power. It entirely lost its custom, its machinery greatly depreciated, and part of it became almost, if not entirely, worthless. The building deteriorated from want of use, and the complainant's stock of logs, which was there at the mill to be sawed when the water was cut off, remains there still. Though this court has, in a suit for specific performance, jurisdiction to award compensation for any deficiency in the title, quantity, quality, description or other matters touching the estate, it has not jurisdiction to award damages for the breach of a contract, except as ancillary to a specific performance or to some other relief. *Story's Eq. Jur.* § 799; *Wiswall v. McGowan*, *Hoffm. Ch.* 125; *Gilb. For. Rom.* 214.

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In *Corporation of Hythe v. East, L. R. (1 Eq.) 620*, the court said that, before Sir Hugh Cairns's act, the court had no power to give damages.

In *Copper v. Wells, Sax. 10*, it was held that where specific performance of an agreement has become impossible, or, from the nature of the contract, cannot be decreed, the party aggrieved is entitled to compensation in damages for the non-performance of the agreement (and see, also, *Lounsbury v. Locander, 10 C. E. Gr. 554, 559*), but that there is a distinction between damages arising from the non-performance of the contract, which damages may be partly imaginary and partly the result of actual or supposed loss or inconvenience, and the damages to which the party is justly entitled for repairs or beneficial or lasting improvements, made on the faith of an engagement afterwards discovered to be defective or impossible to be executed by a default of the opposite party; and that in the first case the damages can be properly assessed only by a jury, upon an issue of *quantum damnificatus*; in the last, the compensation may be safely ascertained by an inquiry before a master or a commissioner, or, at the discretion of the court, an issue may be awarded.

In *Berry v. Van Winkle, 1 Gr. Ch. 269*, that case was followed, and compensation was decreed for valuable and permanent improvements placed on leased premises, while damages for alleged infringements on the lessee's rights during the term were denied. Referring to the case of *Copper v. Wells*, the court says, that while that case establishes a rule by which compensation may be obtained in this court for permanent improvements placed on leased premises, it by no means sanctions the whole relief sought in the case then under consideration, and the chancellor (Pennington) added that he was not disposed to go further, and he, therefore, as to the damages for the alleged infringements on the lessee's rights during the term, left the parties to their legal remedy.

There will be no decree for damages in this case.

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THE CAMDEN HORSE-RAILROAD COMPANY

v.

THE CITIZENS COACH COMPANY.

1. A horse-railroad company, chartered by the legislature, may, while legally operating its road, enjoin a rival coach company, organized under the general corporation act, and licensed by the city where the tracks are laid, from regularly using its tracks with coaches adapted thereto, in competition with it in its business in transporting passengers and goods for hire, and from obstructing it in the use of such tracks by impeding the passage of its cars, by stopping thereon to take up and let down passengers.

2. Under a special prayer, relief of the same general character but less extensive, may be granted, or the prayer may be amended, if necessary.

Bill for an injunction. On final hearing on pleadings and proofs.

Mr. D. J. Pancoast and Mr. P. L. Voorhees, for complainant.

Mr. A. C. Scovel, for defendant.

THE CHANCELLOR.

The complainant was incorporated by an act of the legislature, approved March 23d, 1866 (*P. L. 1866 p. 640*). By the charter and its two supplements, one of which was passed April 2d, 1868 (*P. L. 1868 p. 628*), and the other March 11th, 1872 (*P. L. 1872 p. 513*), it was empowered to construct and maintain and operate a horse-railroad in certain specified streets in Camden, and demand and take compensation for the carriage of passengers and property thereon. It was provided by the original act that the track should be of the same width as the wagon track established by law, and that the track and rails should, in all cases, be

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laid level with the surface of the streets through which the road should pass, and in conformity with the grades of the streets. It was also enacted by that act, that if any person or persons should willfully or maliciously impair, injure, destroy or obstruct the use of the railroad, or any of its works, carriages, animals or machines, such person or persons should forfeit and pay therefor to the corporation three times the amount of damages sustained by means of the injury, to be recovered in the name of the corporation, with costs of suit, in any court having cognizance thereof. Under the legislative authority which it possessed under its charter and the supplements thereto, the complainant laid its tracks at a cost of about \$100,000, and has maintained them at an average expense of \$1,200 a year. In July, 1876, the road was in full operation. The defendant became incorporated then, under the act "concerning corporations," for the purpose of carrying passengers and goods and merchandise, in coaches, in and about the city of Camden, for compensation.

The bill was filed on the 10th of October, 1876. It states that the defendant, since its organization, has procured a large number of horses and coaches, and entered on the business of carrying passengers in and through Camden; that the coaches are made so as to fit and run upon the railroad of the complainant; that the defendant, in the pursuit of its business, continually drives the coaches in, through and along the same streets on which the complainant's road is built, maintained and used; that the defendant continually uses the complainant's road and tracks in and on those streets for the purpose of its business, by driving its coaches upon and along those roads and rails, to the great damage thereof, and against the complainant's wish and express request, greatly injuring and destroying them; and that it greatly and unnecessarily annoys, vexes, hinders and obstructs the complainant in the lawful use and exercise of its property and franchises, by purposely driving its coaches upon and along the complainant's road and tracks, in front

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of its cars, and stopping thereon to take, receive and deliver and discharge passengers and baggage, thereby greatly impeding the progress of the complainant's cars on its road and tracks, and injuring its business.

The bill further states that the streets on which the tracks are laid, are about sixty-six feet wide, and that the tracks are five feet and a half in width, and are so constructed and laid as not to interfere with the rights of the public in the free and unobstructed use of the streets for traveling and other lawful purposes.

By its answer, the defendant alleges that the city council of Camden has, under the city charter, power to regulate the use of the streets, and to license and regulate hacks, cabs, omnibus, stage or truck owners and drivers, carriages and vehicles for the transportation of passengers and merchandise, goods or articles of any kind in the city; that the defendant was duly licensed by those authorities to carry on its business and run its coaches or omnibuses in and along all the streets of the city, for the purpose of carrying passengers and goods and merchandise in Camden, and that the city council, in September, 1872, by ordinance, duly ordained for the regulation of travel on horse-railroads in the city, that all persons driving vehicles on any horse-railroad in the city running east and west, should have the right to the railroad track when going east, and, meeting any other vehicle going in the opposite direction, should be compelled to turn entirely off the track; and all persons driving vehicles on any horse-railroad in the city running north and south (north of Market street), should have the right of way to the railroad track when going north, and, when meeting any other vehicle going in the opposite direction, should be compelled to turn entirely off the track, and that all persons driving vehicles on any horse-railroad south of Market street, should have the right of way to the railroad track when going south; provided, that the horse-railroad companies should, in all cases, have the right of way.

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The answer denies that the defendant's coaches are made to fit and run upon the road and rails of the complainant; and, also, that in the pursuit of its business, the defendant does the acts or inflicts the injury complained of in the bill; and, while admitting that the tracks are the private property of the complainant, it denies that the latter is entitled to the exclusive use thereof as against the defendant or any other persons seeking to use it in the business of transporting passengers from one point in Camden to another. It also denies that the tracks are laid so as not to interfere with the free and unobstructed use of the streets on which they are for traveling and other lawful purposes, and states that they are so laid as to interfere with and obstruct such use, and that they are, in some places, six inches above the established grade. It states the width of the streets through which the complainant's road is laid and the distance from the curbs to the railroad tracks; that the distance between the rails of the tracks is, measuring on the inside, five feet and six inches; that the complainant did not lay its tracks in part of one of the streets until a long time after the defendant had begun running its coaches over that part of that street; and it states that the defendant has occasionally (but it denies that it has done so regularly) driven its coaches on the tram-way of the complainant's road when the road was not occupied by the cars of the latter or the vehicles of others, but alleges that the defendant has, in no other way, used the complainant's rails or roads except in crossing the rails when turning out or in crossing the streets.

On the filing of the bill, an injunction was, after an order to show cause, granted, restraining the defendants from "constantly, or at regular intervals, using with its coaches, in pursuit of its business of carrying passengers in and about the city of Camden, the railroads of the complainant, but the right to use the tracks incidentally in the use of the streets was expressly recognized and in nowise interfered with." *Citizens Coach Co. v. Camden Horse R. R. Co.*,

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1 Stew. 145. The order for the injunction was reversed by the court of last resort, on the ground that, in the opinion of the appellate tribunal, the case fell within the general rule that if the facts constituting the claim of the complainant for the immediate interposition of the court are controverted under oath by the defendant, the court will not interfere at the initial stage of the cause. The merits of the controversy otherwise appear not to have been passed upon. *Citizens Coach Co. v. Camden Horse R. R. Co., 2 Stew. 299.*

The franchise of a street-railway is defined to be a right to construct and maintain a railway on the surface of a street, and to carry passengers, and to demand tolls; and it is said to be so far exclusive as that others may not use the road without a grant from the legislature. *Ang. on Highw. § 32.*

Said Chief-Justice Denio, in *Davis v. Mayor &c. of New York, 14 N. Y. 506, 516*: "The feature which most widely distinguishes a railroad from ordinary streets and highways is, that the former is a strict monopoly, entirely excluding all idea of competition. There may be rival roads, but there can be no rivalry on the same road."

In *Sixth Avenue Railway Co. v. Kerr, 45 Barb. 138*, the exclusive power conferred by a grant to build, maintain and operate a street-railroad, is said to be that of using railway carriages thereon in the same manner as the grant of a stage line confers, for the time being, the grant of a monopoly of using such stages for the transportation of passengers for hire on that route.

In his opinion in *Jersey City & Bergen R. Co. v. Jersey City & Hoboken Horse R. Co., 5 C. E. Gr. 61*, Chancellor Zabriskie said: "The iron rails laid by the complainants are their property; although laid in the street, the property in them is not abandoned or given to the public, the city or the defendants, any more than stone steps, iron railing, posts, vault covers, or flagging placed within the limits of the street by proper authority, are abandoned or given to the public. In most cases they could be removed by the

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owner, and, in all cases, he could maintain an action against any one injuring or appropriating them. No doubt the incidental crossing over those rails by any one in using the street, or even in the use of the street, driving occasionally upon or along them, might be justified by an implied permission from their being placed in the street without any regulation to prohibit such use. But no one would be allowed to have a carriage constructed especially to pass over the track, and adapted to no other part of the street, and by it to appropriate the complainant's property to his use." In the report to the legislature of Massachusetts, referred to in that opinion, the like views as to the rights of such railroad companies are expressed. The language is as follows: "It is certain, we think, that the grant of an act of incorporation to a company for the purpose of constructing and operating a railway for the transportation of passengers, although located in and along a highway, is a franchise, and one of an exclusive character, to some extent. The extent of the exclusiveness of a grant of this character, where no exclusive words are contained in the grant, must depend upon the reasonable and fair implications to be gathered from the nature of the business and other surrounding circumstances. And, in a case of this kind, where the incorporation is exclusively for the purpose of transporting passengers and taking tolls, in which it must be regarded as a fair implication from the very nature of the grant, the investment requisite to carry it into operation, and the necessity of avoiding competition in order to produce any adequate return, that the franchise must be considered as being exclusive of all similar transportation upon the same route by mere private enterprise. It would be little short of absurdity to suppose that it could have entered into the contemplation of the legislature, or of the companies, that, after obtaining their location, and after having erected and equipped their roads, at large expense, it was still competent for any person, natural or corporate, at his own mere option, to construct cars and

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divide the business by running upon the same track laid by such company. * * * But they (the legislature) may, nevertheless, allow other persons, either natural or corporate, to do a similar business in the same streets, or to do it on the tracks of an existing company by making compensation to the other company, whenever, in their judgment, the public good requires it. In one case, the grant, being wholly independent, is understood to be made because the amount of travel is supposed to require two such modes of conveyance, and, in the other, the compensation is regarded as an equivalent for the use." 1 *Redfield on Railw.* 330. See, also, *Brooklyn Cen. R. R. Co. v. Brooklyn City R. R. Co.*, 32 *Barb.* 358; *Commonwealth v. Temple*, 14 *Gray* 74; *Metropolitan R. Co. v. Quincy R. Co.*, 12 *Allen* 262.

That the complainant is entitled in equity to protection in the exercise of its franchises not only against unlawful competition, but against unlawful obstruction, cannot be doubted. *Rar. & Del. B. R. Co. v. Del. & Rar. Can. Co.*, 3 *C. E. Gr.* 546; *Jersey City & Bergen R. Co. v. Jersey City & Hoboken Horse R. Co.*, 5 *C. E. Gr.* 61; *Central R. R. Co. v. Pennsylvania R. R. Co.*, 4 *Stew.* 475.

In this case (2 *Stew.* 305), it was said by the court of errors and appeals that the complainant is to be secured in the enjoyment of the privileges conferred by its charter. Injunction is the proper remedy to secure to a party the enjoyment of a statute privilege of which he is in actual possession, and his legal title whereunto is not put in doubt. *Croton Turnp. Co. v. Ryder*, 1 *Johns. Ch.* 611; *Rar. & Del. B. R. Co. v. Del. & Rar. Can. Co.*, 3 *C. E. Gr.* 546; *High on Inj.* § 575.

The rights of the parties are substantially as they were declared to be in the former opinion in this case in this court. While the defendant has a right to the use of the complainant's road in, and as incidental to, the use of the street of which that road forms a part, it has not the right

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to use the tracks in competition with the complainant in its business thereon, and it has not the right to obstruct the latter in its use of its road. By the legislative grant the complainant obtained a franchise to build and maintain and operate a railroad in the streets designated, and to transport passengers and goods thereon, and take compensation therefor. It acquired no estate or interest in the land of the street, indeed, but only the mere right to the use of the highway or public easement. *Hinchman v. Paterson Horse R. Co.* 2 C. E. Gr. 75, 80. But while its use of the street is in common with others, it has some rights superior to theirs. *Middlesex R. R. Co. v. Wakefield*, 103 Mass. 261; *Hegan v. Eighth Av. R. R. Co.*, 15 N. Y. 380. Said the court in the latter case: "When a railroad is laid lengthwise upon a street, it is not unlawful for common vehicles to travel upon the track, across it or lengthwise. The company has the exclusive right to the track while its cars are passing, but its right is not otherwise exclusive. Other carriages must keep out of the way of the cars."

Said the court in *Louisville & Portland R. Co. v. Louisville City R. Co.*, 2 Duv. 175: "The railroad company's right to its own road, without intrusion on it or obstruction in the use of it, is necessarily exclusive." See, also, *Whitaker v. Eighth Av. R. R. Co.*, 51 N. Y. 295.

In *Adolph v. Central Park &c. R. Co.*, 43 N. Y. Sup. Ct. 199, it was held that the ordinary vehicle and the street car have equal rights on the track, and that neither has superiority over the other, but it is obvious that such a rule disregards the franchise of the railroad company, and is not maintainable.

In *Troy & Lansingburgh R. R. Co. v. Collins*, N. Y. Sup. Ct., Dec. 1878, the suit was by a horse-railroad company to restrain the owner of a wagon, adapted to the railroad track and used to carry passengers thereon, from using the track therewith as a common carrier of passengers for hire. On the filing of the complaint, a preliminary injunction was granted. The copy of the record handed to me does

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not show the subsequent proceedings in the cause. The complainant would be entitled to protection against the unauthorized use of its track by another railroad company, and against the like use of it by any one with a railroad car. It is also entitled to protection against such use by a company or an individual in competition with it, in its business of transporting persons and goods on its track, although the vehicle used be not a railroad car, but a wagon, running not on the track, but on the tram-way thereof. If the track be used as a railroad for such purpose, the injury to the complainant is equally a subject of judicial concern, whether the one part of the rails or the other is used. Unless the complainant can obtain protection against such use of its road, and can obtain relief against obstruction in the use thereof, its franchise is worthless, and its road valueless.

The bill complains that the defendant continually uses the track, and that it greatly and unnecessarily annoys, vexes, hinders and obstructs the complainant in the lawful use and exercise of its property and franchises by purposely driving its coaches on the railroad in front of the complainant's cars and stopping them to take in, receive and deliver passengers and baggage, and thereby greatly impedes the progress of the complainant's cars, and injures its business. The defendant, as has already been said, has the right to use the track in the use of the street. The object of the legislature in requiring that the track shall be of the width of the established wagon track, is manifestly that the railroad may be used by ordinary vehicles if it be desired, as opportunity may be afforded. But the complainant has a right to the track superior to the right of the defendant, and, in the use of the track, the latter must give way to the former. The complainant has an exclusive right to the business of transporting persons and property on the track, and the defendant has, therefore, no right to carry on that business in competition with it on the railroad.

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The defendant, as before stated, has no right to hinder or obstruct the complainant in the use of the track. It is not lawful for it to stop its coaches before the cars on the track, to take up or let off passengers, or take up or deliver goods, and so or otherwise hinder and obstruct the complainant's cars.

The weight of the testimony in the cause sustains the allegations of the bill. Colonel McKeen, one of the directors of the complainant, and its treasurer, in his testimony, states the causes of complaint to which this suit is due, as follows: "The causes generally, without going into particulars, were using the tracks of the company, and obstructing us in the pursuit of our business by getting in front of our cars on the track, letting in and discharging passengers, and stopping our cars while doing so, wearing out the rails of the company by continuous use of the track in running on the rails. They ran upon our track to have advantage of our superior mode of travel over the stones in the streets, in competition with us in carrying passengers in the city of Camden." He further says: "The coaches of the defendant would interfere with us at the ferries by whipping in and getting ahead of us at Delaware avenue and Federal street. This was about six hundred feet from the ferry. They would then hold the track until they reached Fifth street. By holding the track, I mean getting ahead of us and taking in and letting out passengers, and stopping on the track, and thus preventing us from making time. This was before the filing of the bill. Our cars were often obliged to stop and wait for them. This was almost a daily occurrence; it was not continuous; it occurred when they had occasion to take in and let out passengers. This stoppage occasioned hurt and inconvenience to our business. They used our track to draw their coaches over whenever they could get on them, and, when they were ahead of us, they stayed on and compelled us to stop."

Mr. Hood, the complainant's superintendent, and who is a director and the secretary of the complainant, states the

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causes of the suit thus: "Speaking generally, those causes were the detention of our cars, collisions with our cars and the wearing out of our tracks by their coaches, in using the tracks to facilitate their business. At the time of the filing of the bill they were running regularly seven coaches on portions of our tracks, and extra coaches from time to time for some time in the morning and also in the evening. Their use of our tracks by their coaches was almost continuous, but there were times when they were not on our rails. The use they made of our tracks was of choice. The existence of our tracks in the street did not at all interfere with the travel of vehicles or wagons of that or any other character; on the other hand, I believe that streets where our rails are laid teamsters and others drive to, for the purpose of traveling on the rails. I have had teamsters and others tell me they did it, and I have witnessed it every day myself. *

* * The effects of their use upon our tracks has been noticeable to me, and, before the filing of the bill, more noticeable than our own use of it. The use of our track by them was, and certainly is, a material disadvantage to us in our business, and is a material advantage to them. Both companies do the same kind of a business on the same streets, that is the transportation of passengers. * *

* I know that it was a great advantage to them in their business to use our tracks; there is no doubt about it. It was advantageous to them in the saving of horse-flesh by the vehicles pulling that much more easily, in the wear and tear of coaches, and an easier and smoother surface for their passengers to ride upon, in this way inducing them to ride. It is clearly a greater inducement for people to ride in coaches when they run over rails than when they run over cobble-stones."

The proof is, that the defendant adapted some of its coaches to the track; that it habitually used the track, its coaches setting out ahead of the cars, and getting in advance of them on the track, obstructing and hindering them in their progress by stopping to let off and take up passengers,

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and forestalling them in the business on the road, thus competing with the complainant in its own business, on its own track, and subordinating the complainant's use of the track to the defendant's use thereof. For these injuries the complainant has manifestly no adequate remedy at law. It is entitled to relief in this court.

It is suggested by the defendant's counsel, that the prayer of the bill is merely the special one, that the defendant may be restrained from using, with its coaches, in the pursuit of its business of carrying passengers in and about the city of Camden, the railroad of the complainant, and it is urged that that prayer cannot be granted, and that, therefore, inasmuch as there is no general prayer, no relief can be granted. But the prayer might be amended, if necessary. It is not necessary, for the court may, under the special prayer, give appropriate relief which is of the same character as, but less extensive than, that which is prayed for.

The defendant will not be restrained from using the tracks, but it will be enjoined from using them in competition with the complainant in the business of carrying passengers and property thereon, and from obstructing or hindering the complainant in its use of the tracks.

THE TRADESMEN'S BUILDING AND LOAN ASSOCIATION OF
CAMDEN, N. J.,

v.

CHARLES THOMPSON and others.

A release of mortgaged premises to a person having no actual notice of the assignment of a mortgage is, by statute, valid if such assignment has not been recorded. But a cancellation of such mortgage by an attorney at law, under a supposed authority from the mortgagee (the evidence as to the mortgagee's direction was conflicting, and a

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mortgage which complainant claimed was to have been substituted for the original, was never delivered),—*Held*, to be invalid as having been unauthorized, and set aside.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. M. V. Bergen, for complainants.

Mr. J. M. Scovel, for defendant.

THE CHANCELLOR.

The complainants allege that when they agreed to take their mortgage, it was upon the understanding with the mortgagors that two mortgages, one given to Wallace for \$1,500 and interest, and the other to Franklin for \$500 and interest, which were then upon the premises, should be cancelled, so that their mortgage should be the first. The Wallace mortgage was paid off and cancelled, and the other was cancelled also, but was not paid off. Another mortgage in favor of Franklin, for \$500, was executed in its stead, and recorded after the complainants' mortgage. The complainants' mortgage was for \$2,200 and interest. The Franklin mortgage had never been taken from the register's office from the time when it was left for record. Franklin had, before the arrangement for the complainants' mortgage was made, assigned it as collateral security for a note of \$400, to Isaac Jeanes & Co., of Philadelphia, but the assignment, which was in writing, was not recorded. Neither the complainants nor the mortgagors had notice of the assignment. The complainants say that the Franklin mortgage was cancelled, and the substitution for it made with Franklin's consent, but he positively and explicitly denies it. Mr. Nicholls, the complainants' secretary (who acted in behalf of the mortgagors in obtaining the loan for the complainants), swears, however, that Franklin, in a conversation with

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him in reference to the arrangement, said he was willing to do anything he could to help Mrs. Thompson (the owner of the property), and told him to tell Mr. Bergen, the complainants' attorney, to go to the register's office and get his (Franklin's) mortgage, and have it cancelled, and have the complainants' mortgage put on record, and then have another mortgage drawn for him, and have it placed on record. Mr. Bergen testifies that Franklin told him that the arrangement was to substitute another mortgage for his, the substituted mortgage to be recorded after the complainants' mortgage, and requested him to see that the mortgage to be given to him in lieu of the mortgage which was to be cancelled, was properly drawn and duly recorded. Mr. Bergen says Franklin proposed to arrange for the payment of the interest which had accrued on his mortgage in his dealings with Mrs. Thompson, one of the mortgagors, who was doing work for him. He also says that Franklin told him that his mortgage was at the register's office, and had never been taken away from there since it was left to be recorded, and that he would find it there, and told him to get it and cancel it. Franklin swears that he told Mr. Nicholls, when the latter asked him if he would consent to the cancellation of his mortgage, that he would have to see Isaac Jeanes (one of the assignees) about it. He explicitly denies that he consented to the cancellation, or knew of it, and denies that he said what Mr. Nicholls and Mr. Bergen say he did on the subject. He swears, also, that he did not think that Nicholls could cancel the mortgage unless he (Franklin) was present. He says, further, that he did not know that they proposed to cancel it. There appears to have been a misunderstanding between the parties to the transaction. Mr. Bergen went to the register's office and obtained the mortgage, and caused it to be cancelled.

The "act concerning mortgages" (*Rev. 708 § 34*) provides that when any assignment of mortgage thereafter (the act was passed in 1853) made is not recorded as in the act

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provided, payments made to the assignor in good faith, and without actual notice of the assignment, and any release of the mortgaged premises or any part thereof, to a person not having actual notice of the assignment, shall be as valid as if the mortgage had not been assigned. The complainants' counsel insists that the assignment, not having been recorded, the mortgagee could, therefore, if he saw fit to do so, discharge the premises from the mortgage, and such discharge is, as to the complainants, under the circumstances, valid as against the assignees, inasmuch as the complainants had no actual notice of the assignment. The act does not in terms apply to a cancellation of the mortgage, but to a release. A cancellation is, indeed, in effect, a release of the whole of the mortgaged premises from the mortgage. In this case not only was no release executed, but the mortgagee did not, in person, undertake to discharge the mortgage, nor did he give any written direction or authority to do so, and he swears he gave none at all, and did not consent to the cancellation. He never received the mortgage which was made in substitution. It was not offered to him until after this suit was brought. The cancellation must be held to have been wholly unauthorized, and it will be set aside accordingly. *Trenton Banking Co. v. Woodruff*, 1 Gr. Ch. 117; *Harris v. Cook*, 1 Stew, 345.

The original Franklin mortgage will be held to be valid and prior to the complainants' mortgage.

WILLIAM W. CONOVER

v.

WILLIAM B. GROVER and others.

A first mortgage was given to a building society, and certain shares of stock afterwards surrendered by the mortgagor. The mortgage authorized an insurance of \$1,000 on the premises, at the expense of

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the mortgagor. A fifth mortgage thereon, given to a married woman, was assigned as collateral security, to three different persons, whose assignments were duly recorded. The third assignee was also the assignee from the lessor of a lease of the premises, executed six days after the bill was filed. A receiver of the rents was appointed, *pendente lite*, on foreclosure of the fifth mortgage.—*Held*,

(1) That neither the mortgagor, nor the third assignee of the fifth mortgage, could attack its assignments on the ground that it had been assigned by a married woman to secure her husband's debts.

(2) That the holder of the first mortgage could only recover the sum due thereon after deducting the withdrawal value of the shares when surrendered.

(3) That he could only recover the premiums paid for insurance to the extent of \$1,000.

(4) That the assignees of the fifth mortgage were entitled to be paid in the order in which their several assignments were recorded.

(5) That the rents of the premises accrued since the receiver's appointment, go to him for the benefit of the mortgagees.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. R. Allen Jr., for complainant.

Mr. E. S. Savage, for William B. Grover.

THE CHANCELLOR.

The bill is filed to foreclose a mortgage given by William B. Grover and wife to Sally A. Grover (upon lands in Monmouth county), dated July 8th, 1876, to secure the payment of \$2,000 in three years, with interest semi-annually. The mortgage contains a proviso that, if default be made in payment of the interest for ninety days, the principal shall become immediately due at the option of the mortgagee or her assigns. The mortgagee, with her husband, assigned the mortgage and the bond which it was given to secure, by assignment dated November 11th, 1876, to John A. Worthly and others, to secure to the assignees respectively, certain specified sums of money, amounting in the aggregate to

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\$1,310.74. The assignment was recorded December 27th, 1876. By another assignment, dated July 16th, 1877, they assigned the bond and mortgage to Grover T. Applegate and Robert Allen Jr., to secure to them respectively the payment of certain sums of money therein specified. That assignment was recorded on the 30th of August, 1877. By a third assignment, dated August 29th, 1877, and recorded on the 20th of September following, they assigned the bond and mortgage to Richard L. Leggett, to secure to him the payment of a sum of money therein mentioned. There are four prior mortgages upon the premises, two of them given to the Red Bank Mutual Building and Loan Association, and assigned to Leggett, August 29th, 1877. By a lease dated August 31st, 1876, William B. Grover, then and still the owner of the mortgaged premises, leased them to Jacob Degeuring for the term of five years, to commence April 1st, 1877, at the yearly rent of \$500, payable monthly, in advance.

The bill is filed to foreclose the mortgage to Sally Grover, for principal and interest, on the ground that the interest at the time of filing the bill was in arrear for more than ninety days. The questions presented for decision are: First, in what order the assignees of that mortgage shall be paid out of the proceeds of the sale of the mortgaged premises applicable to it, whether *pro rata*, or, if not, in what order; second, whether Leggett is entitled to recover, under the mortgage to the building and loan association, the full amount of the face value thereof, with interest, or only the amount which he paid therefor, with interest thereon; and, third, whether the rent under the lease for the mortgaged premises, is applicable to the payment of the mortgages (a receiver having been appointed in the cause during its progress), or whether it belongs to Leggett, to whom William B. Grover has assigned the lease.

William B. Grover, by his answer, attacks the assignments of the mortgage given to Sally Grover, upon the

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ground that they were made by her to secure her husband's debt, while the mortgage was her separate property. It is obvious that if such objection could be made by her, as, in fact, it could not, it cannot be set up as a defence by William B. Grover. The assignments made by her and her husband are assignments of the bond and mortgage to secure the debts therein mentioned to the assignees. Each assignment is of her whole interest in the bond and mortgage to secure the particular debt or debts mentioned in the assignment. The bond and mortgage, therefore, stand to the assignees as security for their debts in the order of the dates of the assignments, no question of notice being raised.

It appears that the building and loan association mortgages were given to secure loans made upon shares of stock held by the mortgagor in the institution. At the time of the assignment of those mortgages to Leggett, certain of those shares, then of considerable market value, were surrendered by the mortgagor to the association at a price fixed by the by-laws. It is apparent, from the evidence, that the surrender was in satisfaction of so much of the mortgage. The shares of stock were held as collateral to the mortgage. The mortgagor received nothing for the shares on their surrender to the company. The mortgages were, therefore, thus satisfied to the extent of the withdrawal value, as it is called, of the shares. Leggett paid for the mortgages the amount which was due to the association thereon, after crediting the withdrawal value of the shares surrendered. He, of course, is entitled to recover no more under the mortgages than the association would be entitled to recover.

After the filing of the bill, application was made to the court for the appointment of a receiver of the rents, issues and profits of the mortgaged premises, which was granted. The assignment by Grover to Leggett of the lease, was made October 30th, 1877, six days after the bill was filed. The mortgagees are entitled to the rents and profits which

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have accrued since the appointment of the receiver, if necessary, for the satisfaction of their mortgages.

The complainant, for his security, obtained insurance against fire, to the amount of \$1,500, upon the buildings on the mortgaged premises, for the premium paid for which he claims priority over all the mortgage encumbrances. He holds, by assignment, the first and second mortgages. One of them provides for insurance to the amount of \$1,000 as collateral to the mortgage. He is entitled to recover, under that mortgage, a proportionate part (two-thirds) of the premium paid by him. He obtained security to the amount of \$1,500, and was authorized, under one of the two mortgages, to obtain such security to the amount of \$1,000. The rest of the premium is recoverable, under the mortgage to Sally Grover.

There will be a reference.

THE STATE, JOHN ENGLISH prosecutor,

v.

ABBY L. ENGLISH.

1. By statute (*Rev. p. 318*), when the parents of minor children live apart, the court may, on petition of either parent, make a decree concerning the custody &c. of such children; the parents' rights, in the absence of misconduct, are deemed equal, and the happiness and welfare of the children determine the question of their custody. A decree of divorce for cruelty granted in this court on the application of a wife who had previously separated from her husband, was reversed by the court of appeals.—*Held*, that her refusal to return to her husband afterwards was not "misconduct" within the meaning of the act.

2. Where, under the above circumstances, a daughter eight years old and a son ten, preferred to remain with their mother, and she was able to provide adequately for their maintenance and education, and was, in all respects, fit to have charge of them, the court refused to change the custody, making reasonable regulations for their father's access.

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On *habeas corpus* to obtain the custody of the two children of the prosecutor and respondent.

Mr. R. Gilchrist and *Mr. B. Williamson*, for the prosecutor.

Mr. J. Weart and *Mr. I. W. Scudder*, for respondent.

THE CHANCELLOR.

By this proceeding the petitioner seeks to recover the possession of the two infant children (one a boy between ten and eleven years old and the other a girl between eight and nine) of himself and the respondent, his wife. The children are now in the custody of the latter. The petitioner does not allege that they are unlawfully restrained of their liberty, and it is conceded that they prefer to remain with their mother, and, if inquired of as to their wishes, would not only declare such preference, but would be unwilling to go with their father.

The parties are living in a state of separation. They were married in 1867. On the 6th of November, 1875, the respondent left her husband's house in Jersey City, and, taking with her the two children, went to her father's house in that place, and she has ever since remained away from her husband with them there. Four days after she left her husband she filed a bill in this court against him for a divorce *a mensa et thoro*, on the ground of extreme cruelty and praying for alimony and the custody of the children.

NOTE.—The principal cases as to the paramount right of the father to the custody of the children, at common law, in case of separation between him and the mother, and also those cases which recognize the right of the mother in some instances, are collected in 2 *Bish. on & Div.* §§ 529, 542, 546–549. In addition to those citations the following may be referred to generally, as asserting the mother's preference: *Gregg's Case*, 5 *N. Y. Leg. Obs.* 265; *Dumaine v. Gwynne*, 10 *Allen* 271; *Com. v. Smith*, 1 *Brcws.* 547.

As to instances where the court has, by statute, a discretion as to parent to whom such custody may be awarded: *Ibid.*, and, also, *v. Bennett*, *Deady* 299; *Hewitt v. Long*, 76 *Ill.* 399; *Symington v. Symington*, 1 *Sc. App.* 415. See *Mitchell v. McElvin*, 45 *Ga.* 558; *Jo Brannaman*, 10 *Md.* 495.—REP.

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By the final decree in the cause made on the 16th of March, 1876, it was adjudged (*English v. English*, 12 C. E. Gr. 71) that the petitioner, the defendant therein, had been guilty of extreme cruelty towards his wife, and a divorce was decreed with provision for setting it aside by mutual consent. *English v. English*, 12 C. E. Gr. 71. From this decree the petitioner appealed to the court of last resort, and that court, by its decree (*English v. English*, 12 C. E. Gr. 579) on the 16th of July, 1876, decreed that the decree of this court should be reversed in all things, and that the bill of complaint be dismissed, but without prejudice, so that the facts urged in the bill might be used if the case should again be brought before this court. The decree of the appellate tribunal was, on the 4th of August following, made the decree of this court, and the bill was accordingly dismissed without prejudice. Since that time the parties have continued to live separate and the children have remained in the custody of their mother, who, through her father or other relations, has provided wholly for their maintenance and education.

The petitioner, after the making of the decree of the court of errors and appeals, wrote two letters to his wife urging her to return to his house with the children. One of them was written on the 31st day of July, 1876, and the other on the 20th of November following. No answer was returned to either. On the 6th of December, 1876, he made an effort to obtain possession of the children by stratagem. Four men went to the respondent's father's house and, having obtained admission, stated that they had an order of this court for the delivery of the children to them for the petitioner. They were unsuccessful. The petitioner not only disclaims responsibility for the false statement made by these persons that they were authorized by this court to take possession of the children, but for the attempt itself. There was no such order, nor any order on the subject. The next day, the petitioner strove to take possession of the boy while the latter was at school, but the effort was frustrated. On the 23d of February following, he forcibly attempted to

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take the little girl from her mother's side out of a carriage in which they were, in the street in Jersey City. He says in his reply to the return, that this occurrence was purely accidental, and all that took place on his part was the result of the excitement of the moment; that his wife and her sister were in the wagon; that he saw his child and was excited and imprudently stopped the wagon; that he did not attempt to take the child, but could have done so if such had been his intention; that no one interfered to prevent him, and that he was impelled by a desire to embrace the child, and accomplished this purpose, and that that was all he did. The evidence is clear that he attempted to remove the child, by great force, from the wagon, a companion of his holding the horse by the head at the time, and that his violence was so great that persons in the vicinity forcibly interfered and protected the child. It is proved that the child's clothes were torn in the struggle, and that her person bore the marks of his violence.

By the act of 1875 (*Rev. p. 318*), it is provided that when the parents of minor children live separately, this court, upon petition of either parent, shall have the same power to make decrees or orders concerning the care, custody, education and maintenance of the children, as concerning children whose parents are divorced, and that in making an order or decree relative to the custody of children pending a controversy between their parents, or in regard to their final possession, the rights of both parties, in the absence of misconduct, shall be held to be equal, and the happiness and welfare of the children shall determine the custody and possession. It is urged that the refusal of the wife in this case to return to her husband, is misconduct within the meaning of the act just quoted, and that she therefore does not stand on an equal footing with her husband. Neither the court of errors and appeals nor this court, it is needless to say, decreed that she should return to her husband. That was beyond their power. What was adjudged was that, under the circumstances, a decree of divorce should be denied.

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That was a denial of separate maintenance, but it of course left the wife entirely at liberty to return to her husband or not, as she should see fit. For more than three years since the decree of the court of errors and appeals, the parties have continued to live separate. The wife's refusal to return to her husband is not misconduct within the meaning of the act. By that term the legislature meant such conduct as would deprive the party of a moral right to the custody of his or her children. Under the construction contended for in this case, a wife who has left her husband for any cause not sufficient to warrant either an absolute or a limited divorce, would be guilty of misconduct and forfeit all right to the custody of her children as between her and her husband. The statute cannot be construed as applying only to cases in which the parties are living in a state of separation under circumstances which render the separation legally justifiable. *Bennet v. Bennet*, 2 Beas. 144; *State, Baird pros. v. Baird*, 3 C. E. Gr. 190; *S. C. on Appeal*, 4 C. E. Gr. 481; *State, Landis pros. v. Landis*, 10 Vr. 274.

While the rights of the parents are not to be disregarded, the welfare and happiness of the children are to be the paramount consideration in such cases. The court would not be at liberty to hold that, though guilty of no misconduct within the meaning of the act, the wife has not equal right, because, in a given case in the opinion of the court, she might be disregarding her duty in refusing to live with her husband. The wife, in this case, has been guilty of no misconduct, and if the husband be regarded as absolved from all consequences of the conduct complained of in the suit for divorce, then the parties must be considered as having equal rights to the custody of the children. As before stated, it is admitted that the children prefer to remain with the mother. For four years she has entirely provided for herself and them, and has provided for their education, and no complaint is made that she has not done her duty towards them well in every particular, or that she has not provided for them adequately. The petitioner appears to

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have contributed nothing whatever to their support or education during that time. It is admitted that the respondent is in all respects fit to have charge of them. It is not alleged that she will not be able to provide for them in the future. The daughter, as a matter of course, would not, under the circumstances, be taken from the mother. She is only between eight and nine years old. The welfare and happiness of the son, who is not yet eleven years old, will not, in my judgment, be promoted by taking him from the custody of his mother, but the contrary.

All reasonable regulations for access will be made. The petitioner specially asks that the children be ordered into the joint custody of himself and his wife at his house. This, in view of the respondent's unwillingness to live with him, would be to compel her to a resumption of connubial relations under penalty of being deprived of the custody and society of her children. I cannot regard it as permissible for the court thus to deal with the subject under the circumstances, thus to convert this proceeding to determine the custody of children into a proceeding for the restitution of conjugal rights. If it seemed best for the children to order them into the possession of the father, whether the mother would return to her husband or not, the constraint upon her to return or lose the society and care of her children would, of course, as a result, be entirely legitimate. But, dealing with these parties as of equal right, and considering the welfare and happiness of the children as of paramount concern, I am constrained to refuse to change the custody. The father has not in his household the means of taking care of the children as their mother would care for them. He has no one who could supply the want of a mother's care. No stranger could do it.

Warner v. Warner.

CLARA W. WARNER

v.

BEZALEEL WARNER.

1. A defendant who intentionally withholds his defence, and assumes the hazard of escaping a decree on the weakness of the complainant's case, and fails, should be required to bear the consequences of his folly as the penalty of his laches and rashness.

2. In determining whether or not the proofs shall be opened in a case tried before the vice-chancellor, the same rules govern this court that govern the law courts in determining applications for new trials.

3. Error of judgment, or mistake of law by counsel in conducting a cause, is no ground for a new trial.

4. A court of equity will not grant a rehearing because of an error of judgment or mistake of law by counsel as to pertinency or force of certain evidence.

5. A litigant who has had a fair trial, with the aid of counsel of his own selection, and a full opportunity to prove his claim or defence, should, as a general rule, be required to accept the result as final, except he can show, in appellate proceedings, that on the case as made, injustice has been done or error committed.

On petition for leave to amend answer and open proofs after final hearing and decision.

Mr Joseph D. Bedle, for petitioner.

Mr. R. B. Seymour, contra.

THE VICE-CHANCELLOR.

This case re-appears before the court on what I am compelled to regard as a very extraordinary application. The case has already been once fully heard and carefully considered, and, as it was supposed, finally decided, so far as this court is concerned. The judgment then pronounced, and the reason assigned in support of it, will be found in *4 Stew. 225*. The defendant now asks that an order be made

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opening the proofs, that he be allowed to amend his answer by setting up two additional defences, and that he be permitted to prove not only the new defences, but, also, a defence set up in his answer as originally framed, but which he did not prove when he had the opportunity to do so, because—to quote the language of his petition—“he was advised by his counsel that it was unnecessary, as the complainant had made out no case for a divorce against him.” Neither his new defences, nor his proofs are recent discoveries. Every material fact now within his knowledge was fully known to him before his answer was filed. He makes no attempt to conceal this fact. His petition, in this respect, has the merit of perfect frankness. This fact is decisive against his application to amend, even if we lay out of view the other important fact that he has speculated upon the judgment of the court, and willfully delayed his application until he had exhausted the experiment of waiting to see whether he could not win upon the weakness of his adversary’s case. A defendant who purposely withholds what he believes to be a good defence, and assumes the hazard of escaping a decree solely on the weakness of the complainant’s case, and fails, should, as a general rule, I think, be required to bear the consequences of his folly as the just penalty of his inexcusable laches and rashness.

Should the proofs be opened? This part of the application rests exclusively upon an error of judgment of his counsel, and alleged surprise. His counsel, he says, thought the proofs were not sufficient to entitle the complainant to a decree, and, therefore, advised him not to put in all his proofs. The court, unfortunately, reached a different conclusion, and has adjudged that the complainant is entitled to its decree. This conclusion, it is said, is wrong; not, however, upon the proofs as they now stand, for if that were the grievance, an appeal would afford an easy and sure remedy, but upon the actual facts of the case, as they exist *aliunde* the proofs, and, therefore, he insists that he should be afforded another opportunity to make his defence. His

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application is, I think, without precedent. I am sure it cannot be granted without giving litigants a most dangerous license, under which they will be at liberty to experiment and trifle with the administration of justice, as their caprice or interest may dictate.

In determining whether the proofs should be opened in a case tried before the vice-chancellor, by the oral examination of witnesses, this court is governed by the same rules that the law courts apply to applications for new trials. This court will open the proofs before argument, upon the discovery of new and material evidence, provided it is shown that the applicant could not have discovered the new matter, by the exercise of reasonable diligence, before the proofs were closed. *Mulock v. Mulock*, 1 Stew. 15.

Error of judgment, or mistake of law by counsel, has never been esteemed sufficient reason for granting a new trial. More than one hundred and fifty years ago, a judge of the queen's bench said: "The mistake of the judge or jury is good cause for a new trial, but I never yet heard that the mistake of counsel was so." *Queen v. Helston*, 10 Mod. 203. And Lord Ellenborough, in *Hall v. Stothard*, 2 Clit. 267, said: "The client must be bound by the conduct of his counsel, otherwise there would be no end of applications to the court for new trials. Where the parties wish one course to be adopted and counsel take another, the parties must, nevertheless, abide by the acts of their counsel, however contrary to their wishes." The same views have been expressed in many other cases. The mistake of counsel in failing to object to the admission of illegal evidence has uniformly been held to be a waiver of the objection, and to constitute no ground for a new trial. *Den v. Geiger*, 4 Hal. 236; *Abbott v. Parsons*, 7 Bing. 563; *Sherman v. Crosby*, 11 Johns. 70; *Jackson v. Jackson*, 5 Cow. 173; *Price v. Fugua*, 4 Munf. 68.

The application under consideration is, in all essential particulars, an application for a rehearing. Such applications are never granted because counsel has committed an

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error of judgment in the conduct of his cause. Judge Story says: "No court of equity has ever felt itself at liberty to grant a rehearing upon the suggestion of an error of judgment or mistake of law by counsel as to the pertinency or force of evidence to be used in a cause. It will not do to allow clients to have rehearsings and reviews simply because their counsel have not fully appreciated the merits of their cause, or have even overlooked the importance of certain points of evidence." *Baker v. Whiting*, 1 Story 236. In a subsequent case, the same judge said: "The suggestion that the defendant's counsel has been mistaken in his judgment upon the value or force of certain evidence, can have no possible influence upon the mind of the court, in determining whether or not the defendant is entitled to a rehearing. *Jenkins v. Eldredge*, 3 Story 316. Similar views were expressed in *Dennett v. Dennett*, 44 N. H. 535.

Very little reflection will convince any impartial mind that the contrary rule would make litigation, in many cases, so protracted and expensive as to be practically a denial of justice. When we consider the great diversity of methods that may be adopted in the trial of almost any cause, and how wide the field is for difference of opinion as to the best method in any particular case, it would seem to be almost impossible to have any case so skillfully tried that the counsel of the defeated party will not feel that, if he should be afforded another trial, he could do a great deal better. And if his methods happen subsequently to be brought under the supervision of a practitioner of greater experience and skill, they will not unfrequently explain the cause of defeat. A litigant who has had a fair trial, with the aid of counsel of his own selection, and a full opportunity to prove his case or defence, should, as a matter of justice to his adversary, be required to accept the result as final, except he can show, in appellate proceedings, that, on the case as made, injustice has been done or error committed.

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The defendant also asks that the proofs may be opened for another reason, namely, that he and his counsel both supposed that certain evidence, taken before his answer was filed, on the question as to which of the parties should have the custody of the children pending the litigation, would be considered by the court in deciding the case on its merits, and that he is greatly surprised to find that it was excluded. He also says that this evidence was used on the argument without objection, and avers that both parties acted on the idea that it was to be considered evidence on the main question. The reasons why it was excluded are given in the opinion already referred to, and need not be repeated. The evidence taken on the main issue was read prior to the argument, but that which the defendant says he supposed the court would consider, was not; nor was the court informed that there was any understanding or agreement that it should be considered evidence on the main issue. The petition does not allege that an agreement of that character had been made. When the vice-chancellor entered upon the consideration of the case, he read part of the excluded evidence before discovering that it had been taken before issue joined, subsequently finding a memorandum on the master's notes, showing that verbal notice had been given by the solicitor of the defendant to the complainant's solicitor that he intended to use, on the final hearing, so much of this evidence as was pertinent to the main issue, and foreseeing that embarrassment and difficulty were likely to arise from disregard of an important rule of practice, he called the attention of the solicitor of the defendant to the fact that this evidence could not be considered, except it was made evidence on the main issue by an order of the court; he was also informed that if he desired to have such an order made, he must apply for it upon notice to the other side. The vice-chancellor was subsequently informed by the defendant's solicitor, that he had concluded not to ask for such an order. In view of these facts, the claim of surprise cannot be allowed.

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This application, concisely stated, is this: the defendant, after having had the full opportunity given to him by the law to make his defence, and made such use of it as he thought necessary, and having been beaten, now says that, in consequence of his own laches and the misjudgment of his counsel, he did not make as strong a defence as he is sure he can make, if the court will obliterate the past and allow him to start anew. The merits of his application as thus stated, present just the reason why it should not be granted. The application must be denied, and the petition dismissed, with costs.

JAMES JACKSON and PATRICK H. LAVERTY

v.

MIDDLETON BELL.

1. The mere non-residence of a plaintiff in a judgment at law, and the consequent inability of the defendant therein to serve process on him in other proceedings at law, is, of itself, no ground for staying the enforcement of such judgment.

2. Proceedings on a judgment at law will not be enjoined in equity, in order to give the defendant in such judgment an opportunity to set off or recoup a counter-claim, where such claim is unliquidated, and arose out of an entirely distinct transaction.

On motion to dissolve injunction. Heard on bill, answer and affidavits.

Mr. James B. Vredenburgh, for motion.

Mr. Thomas N. McCarter, contra.

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The bill in this case is founded on a claim to a right of equitable set-off. The defendant, Bell, in December, 1878,

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recovered a judgment in the supreme court of this state, against the complainants, in an action of trespass *de bonis asportatis*, and, at the time the injunction now sought to be dissolved was granted, was attempting to enforce it by seizure and sale of the property of the complainant Lavery. The trespass upon which Bell's recovery is founded was committed by seizing and selling his chattels under an execution issued against another person. Jackson was the plaintiff in that execution, and Lavery executed it as sheriff, under Jackson's direction, after receiving indemnity. The bill avers that Jackson has a counter-claim for damages against Bell, for taking and carrying away a large quantity of personal property, which he held, by virtue of a chattel mortgage, as security for a large debt; that the facts in proof of his claim only recently came to his knowledge, and that, since their discovery, he has been unable, in consequence of Bell's residence being in the state of New York, to institute a suit against him in the courts of this state. The bill also charges that Bell is insolvent, and, if he is permitted to compel payment of his judgment, a recovery by Jackson against him will be fruitless. It prays that Bell may be restrained from enforcing his judgment until he accepts service of process at the suit of Jackson, and, also, until such suit shall have been determined, in order that, if a recovery is had, Bell's judgment may be paid by recoupment.

Bell's answer attempts a denial of all the facts of the complainants' case except his non-residence; but, in respect to the one most important—insolvency—it can only be regarded as an attempt. It lacks both frankness and precision. If the facts stated in the bill present a case which, undisputed, gives the complainant a right to the remedy of equitable set-off, the injunction should not be dissolved.

The cross-demands in this case must, in equity, be considered as subsisting between the same parties. It is true Bell's recovery is against both Jackson and Lavery, but Lavery holds indemnity, and, if he should be compelled to

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pay, he can, at once, compel Jackson to re-imburse him, so that, in fact, the ultimate liability must fall on Jackson alone.

The fact that Bell is a resident of a sister state, is no reason why he should be denied the fruits of his judgment, or even delayed in their collection; nor should we attempt to coerce him, by restraining him in the collection of his judgment, to come into our tribunals to litigate with his adversary. If, upon the case made by the bill, we would not enjoin one of our own citizens, we must not enjoin him. This court must give the same measure of justice to the citizens of a sister state that it metes out to its own. *Murray v. Toland*, 3 Johns. Ch. 569; *Rawson v. Samuel*, 1 Cr. & Ph. 161.

The remedy by set-off, as enforced in equity, is undoubtedly somewhat broader and more liberal than that given by statute, but it has limits. The mere existence of a cross-demand is not enough to establish a right to it, nor will the existence of an unsettled account, out of which a cross-demand may arise, be sufficient. *Heicett v. Kuhl*, 10 C. E. Gr. 24; *Whyte v. O'Brien*, 1 Sim. & Stu. 551; *Dodd v. Lydall*, 1 Hare 337; *Gordon v. Pym*, 3 Hare 223; 2 Story's Eq. Jur. § 1436. Nor will a suitor who has recovered damages at law for a breach of contract, be restrained in their collection, though he be a non-resident and insolvent, merely because he may hereafter be found to be indebted to the defendant on the adjustment of an unsettled account. *Rawson v. Samuel*, *ubi supra*. And even where the cross-demands are debts of fixed and certain amount, but had their origin in distinct and independent transactions, equity will not set-off one against the other unless such course is made necessary by some peculiar, equitable consideration, as, for example, where there has been a mutual credit given by each upon the footing of the debt of the other, so that a just presumption arises that the one is understood by the parties to go in liquidation or set-off of the other. *Dade v. Irwin*, 2 How. 389

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The ground upon which the remedy is claimed here is, it will be observed, the mere assertion of a right to damages. Not only is the amount unliquidated, but the right itself is unestablished, and, therefore, uncertain. The demand is a matter belonging exclusively to the common law courts; until established there by a judgment, this court can exercise no control over it. Where both demands have been established by the judgment of a competent court, so that the sums recoverable are fixed and certain, it is common practice for the common law courts to set-off one against the other. *Brown ads. Hendrickson*, 10 Vr. 239. And the same practice prevails in equity, regardless of the nature of the demand upon which the judgment is founded, whether it be a debt or a tort. *Williams v. Davies*, 2 Sim. 461; *Simson v. Hart*, 14 Johns. 62. But courts of equity will never set-off a claim for unliquidated damages against an ascertained sum established by a judgment; nor will they, as a general rule, stay the enforcement of a judgment in order that the defendant may have an opportunity to recover a counter-judgment. *Murray v. Toland*, *ubi supra*; *Winchester v. Hackley*, 2 Cranch 342; *Rawson v. Samuel*, *ubi supra*; *Waterman on Set-Off*, § 423; *Kerr on Inj.* 67. The departures from this rule have been very rare indeed, and have occurred only in cases where the counter-claims have had a common origin and were so inseparably connected that one appeared to be the natural product or outgrowth of the other, and where it was manifest that, if one was permitted to be enforced without allowing the other, the party having the benefit of the enforcement, would derive a profit or advantage from his own wrong. That was the case in *Beasley v. Darcy*, 2 Sch. & Lef. 403. There a tenant owed his landlord rent, and the landlord had committed a trespass on the land which rendered it of less value, and prevented the tenant, to a certain extent, from getting his rent out of it. The landlord brought ejectment against the tenant, claiming a forfeiture of his term in consequence of the non-payment of the rent, and had a recovery. The tenant then sought relief in equity and obtained

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an injunction restraining the landlord from ejecting him; he also obtained an order directing an issue to be tried at law to ascertain what damages he had suffered by the landlord's trespass, and had a recovery for a sum nearly equal to the rent in arrear. He was subsequently permitted to redeem his term by recouping his damages against the rent. *O'Connor v. Spaight*, 1 Sch. & Lef. 305; *Piggott v. Williams*, 6 Madd. 95, and *Lord Cawdor v. Lewis*, 1 Y. & C. 427, are cases of the same class, standing upon the same principle, viz., that the claim and cross-claim sprang from the same transaction and were so perfectly united that one must be regarded as the natural consequence of the other.

But where the claims originate in separate transactions, or have perfectly independent sources—as, for example, where one party makes a claim for damages for the breach of a contract and the other sets up that the first is indebted to him for a balance due on an unsettled account; or where one party sues for freights for the transportation of certain goods and the other claims that he has suffered loss by the negligence of the first in the transportation of other goods—in such cases a court of equity will neither afford a remedy by set-off, nor stay the collection of a judgment founded on one until a counter-judgment has been recovered on the other. *Rawson v. Samuel*, *ubi supra*; *Stimson v. Hall*, 1 H. & N. 831; *Atterbury v. Jarvie*, 2 H. & N. 114.

Chancellor Kent, in *Duncan v. Lyon*, 3 Johns. Ch. 351, said a demand resting entirely in uncertain and unliquidated damages cannot be set-off against a debt. After quoting Lord Mansfield's remark in *Howland v. Strickland*, Cowp. 56, that not only the statute of set-off, but the reason on which it is founded, comprehends mutual debts only, he says: "A claim for uncertain and unliquidated damages is not a debt. This is the settled doctrine of the courts of law, and the same rule prevails in equity. No case can be found where a set-off has been allowed, where the demand was for uncertain damages. To authorize a set-off, the debt must be between the same parties, in their own right, and must

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be of the same kind or quality, and be clearly ascertained or liquidated. They must be certain and determinate debts." This view was adopted in *Holbrook v. Receivers of American Ins. Co.*, 6 Paige 223, where Vice-Chancellor McCoun, after quoting the rule just stated, said the demand to be set-off, must be one arising upon judgment, or upon contract express or implied, or for a liquidated sum, or be capable of being ascertained by calculation. Chancellor Walworth, on appeal, affirmed the correctness of the rule as thus stated (6 Paige 226), although he had previously, in *Lindsay v. Jackson*, 2 Paige 581, said natural equity required that cross-demands [without limiting the scope of the terms] should be set-off against each other, and a recovery permitted only for the balance. It will be observed his language is broad enough to embrace demands of every variety or species; but such, obviously, was not his meaning. His language must be understood as applied to the demands then under consideration, and it will be seen that they were such as were not only within the policy of the rule as previously expounded, but within the express letter of the statute.

Applying these rules to the case made by the complainants' bill, it would seem to be clear that the complainants are not in position to demand the aid they seek. Both their right and the amount they claim are unestablished and unascertained. They do not pretend that their claim originated at the same time, nor in the same source, that their adversary's did, or that there is the slightest connection between the two claims. If they are entitled to the remedy by set-off, or to stay the hand of their adversary until they can recover a counter-judgment, it would be difficult to imagine a case of cross-demands in which a similar claim could not be successfully set up.

The injunction must be dissolved, and the bill dismissed, with costs.

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THE EXECUTORS OF DAVID I. ANDERSON, deceased,
v.

JOHN D. ANDERSON and others.

1. Where two powers are conferred in the same sentence, and by the same words, and the subject or property on which they are to operate is described by the same words exactly, they must be held to embrace the same subject matter.

2. Where a power is expressly given to executors over one portion of the estate, and is not expressly given over another portion, the omission manifests an intention that the power shall not be exercised on that portion of the estate over which it is not expressly given, although, in another portion of the will, general words are used broad enough to justify an implication that the whole estate should be subject to the power.

3. There is a marked distinction between the purposes shown by a specific devise of real estate, and a devise by way of residue; the first shows that the testator means the devisee shall have a thing certain; the other, that the devisee shall have something which is uncertain or unknown, and cannot be described with certainty.

4. Generally, when the personal estate has been exhausted, the residuary real estate is bound to contribute first to the payment of debts, and it is not until the residuary real estate has proved insufficient, that the specifically-devised estates become liable.

On final hearing on bill and answer.

Mr. William Pennington, for complainants.

Mr. John R. Emery, for defendants John D. Anderson and Helena Price.

THE VICE-CHANCELLOR.

Bill in equity by executors asking for construction of will. The court is of opinion that the provisions are pronounced. The

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the testator mean that the rents of the real estate specifically devised, should be applied, concurrently with the rents of the residuary real estate, to the payment of his debts, or, that the residuary real estate should be first appropriated to that purpose?

His first direction touching the payment of his debts is given in these words: "I direct my executors to pay and satisfy all my just debts, including all encumbrances on my estate, or any part of it, whether specifically devised or not, either by way of taxes, assessments, mortgages or otherwise, as soon as may be after my decease." Then, by the eighth clause of his will, he says: "I hereby direct my executors, out of the rents and profits of my estate, or by mortgaging or charging the same, or a competent part or parts thereof, to raise in aid of my personal estate, if insufficient, so much money as shall be requisite to satisfy and pay all my just debts, including all encumbrances on my estate, or any part of it, whether specifically devised or not, either by way of taxes, assessments, mortgages or otherwise, and apply the money to be raised accordingly." The next four clauses make specific devises to his four children, each devise being prefaced by these words: "And immediately after all my debts shall have been fully paid and satisfied by my executors, in manner aforesaid, I give, &c." By the residuary clause, the executors are given power to manage his residuary estate for a period of ten years, including power to rent the same, and to collect and receive the income thereof, and to invest and re-invest the same, and to insure, cultivate, improve and care for the same until divided or disposed of; and until a final division is made, the executors are authorized to sell and convey any part of the residuary real estate which they may deem it judicious to dispose of, and upon such terms as they may think proper; a desire is expressed that the executors shall, during the period of ten years, exercise their best discretion in keeping together, selling, investing or dividing all or any part of the residuary real estate, that the same may be

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managed to the best advantage. The final direction for division is as follows: "And as to the said residue and remainder of my estate and property, of whatever nature, I direct to be divided into four equal parts," and one-fourth part is given to each of his children.

The personal estate applicable to the payment of debts, being insufficient to pay all, resort must be had to the real estate. The lands given specifically to two of the devisees are, together, subject to a mortgage of \$10,000; there are no other encumbrances, but the bill alleges that there are simple contract debts still outstanding, amounting, in the whole, to about \$10,000. The executors estimate the residuary real estate to be worth \$53,000.

From what source shall the money come to pay these debts? The executors claim that the rents of all the real estate, whether specifically devised or not, must be appropriated, while two of the devisees contend that the residuary real estate must first be devoted to that purpose. The theory of the executors is, that while the devisees take immediate, vested estates in the lands, their right to possession and enjoyment is postponed until sufficient money has been raised, from rents of all the real estate, to pay the debts. The theory of the executors rests principally on the direction to them to raise money out of the rents and profits of the testator's estate, or by mortgaging or charging the same, or a competent part or parts thereof, and on the words immediately preceding the words of gift in each devise. The decision of this question must be governed by the intention of the testator. If that can be clearly seen, it must be carried into effect. His will is a law unto the court as well as to the beneficiaries.

Power is conferred to raise money by two methods: first, by setting apart rents and profits, and, second, by mortgaging or charging. The words "my estate," read literally, embrace the whole estate, comprehending those portions given by specific devise, as well as those portions passing under the residuary clause. Both methods have

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the same purpose, and comprehend exactly the same estate. No preference is indicated as to which should be first employed. The executors are at liberty to adopt either. If the power of mortgaging was exercised upon the lands specifically devised, the encumbrance thereon would not be removed; if money was raised by this method to pay simple contract debts, the burden on those lands would not be removed or diminished, but increased. The power to take rents and to mortgage unquestionably refer to the same property. No other construction is possible. One of the testator's most conspicuous purposes in creating this power was to favor the specific devisees; he twice directs that it shall be used to relieve their lands. He intended that it should be used for their benefit. Would it not be absurd to say that he intended it should be used against the very property that he created it to relieve? I think it is entirely plain, that the testator did not mean that the power to mortgage should be exercised against the lands specifically devised.

Did he mean the power to take rents and profits should apply to those lands? Both powers are conferred in the same sentence, and in language precisely identical, the subject matter of each being described by the words "my estate." It would seem to be undeniable, therefore, they were both intended to operate upon exactly the same property. If the executors cannot mortgage the lands specifically devised, it would seem to be perfectly clear that they have no right to the rents and profits arising from them. It would be a dangerous anomaly in legal construction to hold that, where two powers are conferred in the same sentence, and by the same words, and the subject or property on which they are to operate is described by the same words precisely, that the testator means, if the power first-mentioned is used, it shall be exercised against his whole estate, but, if the other is used, it shall only be exercised against a part of his estate. Such a construction might, in some cases, make a better will than that made by the tes-

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tator, but the court is not at liberty to make wills; it must restrict itself simply to the work of construction and definition.

No estate is given to the executors in the lands specifically devised. It is admitted the legal title is in the devisees; nor are the executors authorized, by express words, to take their rents and profits. Their right to do so, if they have any, rests upon implication. With respect to the residuary real estate, such power is expressly given; they have a right to let it, and to receive the rents, and also to sell and convey any part of it which they may deem judicious to dispose of. The fact that power is expressly given to them over one portion of his estate, and not over the other, shows, very clearly, I think, that the testator intended that they should exercise it only on that portion of his estate over which it is expressly given, and not on that portion of his estate over which it is not expressly given, although, in a preceding part of his will, he has used general language broad enough to justify an implication that he intended his whole estate should be subject to the power.

A marked diversity of opinion exists as to whether, where there is a specific devise of land, and, also, a devise by way of residue, resort can be first had, for the payment of debts, to the land devised as residue, or whether each class must contribute ratably. Those who adhere to the view that each must contribute ratably, ground their opinion mainly on the theory that all devises of land, whether the land be designated by certain description or as residue, are specific. To my mind, there is a very marked distinction between the purposes manifested by the two forms of gift. Every specific devise, by its very nature and form, plainly shows that the testator means that the devisee shall have the land given free from liability to contribute to charges not fastened upon it, while the form of the other indicates, with equal clearness, that the testator means the devisee shall only have what may be left after the first devisee has received his gift; that he shall receive some-

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thing which is uncertain or unknown, and cannot be described with entire precision. Lord Romilly, master of the rolls, in *Brownson v. Lawrance*, 6 *Eq. Cas.* 5, says: "The fact of the testator having specifically devised part of the mortgaged estate, and left the other part to pass by the general residuary gift, is, of itself, an expression of his intention that the part which passes by the residuary gift shall be primarily liable to the whole of the mortgage debt in exoneration of the part which is specifically devised." Such intention is made so conspicuous as to be indisputable, when, in addition to the evidence furnished by the form of the gift, the testator directs that the fund to be raised in aid of his personal estate, for the payment of debts, shall be applied in discharge of liens charged on the lands specifically devised. In the case under consideration, the testator has twice declared his purpose to give the lands specifically devised, free from the liens thereon. The first expression is found in his general direction for the payment of his debts, and the second in the clause conferring power on his executors to raise money for that purpose, in case his personal estate is not sufficient. This purpose, in my judgment, is utterly inconsistent with the notion that he intended to give his executors power either to mortgage the lands specifically devised, or to take their income. Vice-Chancellor Bacon, in *Lancefield v. Iggulden*, *L. R.* (17 *Eq.*) 560, said: "When the personal estate has been exhausted, the residuary real estate is bound to contribute towards the payment of the testator's debts, and it is not until the residuary real estate has proved insufficient that the specifically-devised estates become liable."

My conclusion is, that the testator intended, in case of deficiency of personal estate applicable to that purpose, for the payment of his debts, that resort should be first had to his residuary real estate, and not to the residuary and that specifically devised concurrently. The words "and immediately after all my debts shall have been paid and satisfied by my executors in manner aforesaid," immediately preceding each

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of the specific devises, stand opposed to this conclusion. If, in searching for the testator's meaning, we are to look at these words alone, and at no other provision of the will, it is impossible to reach the conclusion just stated; but this is not the true method. The will must be read as a whole; each of its provisions must be given full effect, if possible; if there is dissonance among them, each must be read in the light of the others, and harmony thus produced. If, in this way, the main purpose or scheme of the testator can be discerned, such construction must be adopted as will give it effect. Reading the will in this case according to this rule, I think the office of the clause under consideration must be understood to be, simply to declare that if the residuary real estate shall prove insufficient for the payment of the debts, then resort shall be had to the lands specifically devised. No other construction seems to me to be possible, if we survey the will as a whole and direct our search to the discovery of the testator's general, testamentary scheme.

In my opinion, the rents of the lands specifically devised falling due after the testator's death, belonged to the devisees, and, to the extent that the executors have appropriated them, they are answerable to the devisees.

EBENEZER L. FERRY and WILLIAM H. AKIN

v.

JOHANNA LAIBLE and others.

1. When the creator of a power prescribes the method of its execution, that method must be strictly pursued, so far, at least, as may be necessary to give effect to the creator's purpose.

2. A power to sell lands does not authorize the making of a mortgage.

3. Where a testator directs his executors to continue his business, they incur debts in its prosecution, so much and no more of his a

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as he has directed should be embarked in business, will stand charged in equity for the payment of the debts of the business.

4. Creditors have a right in the first instance, without first exhausting their remedy against the executors personally, to have recourse to the trade property.

5. In determining what part of his estate he intended so to embark, everything should be understood to have been included, which is reasonably and fairly necessary to the full accomplishment of the testator's scheme.

6. A testator, by a direction to continue his business, creates a trust estate which the court will keep separate and apply exclusively to the purposes of the trust.

7. If executors, carrying on business pursuant to the direction of the will of their testator, misappropriate the trade assets in the erection of buildings on lands of the testator not embarked in the business, a court of equity may, according to established methods of procedure, compel restitution of such assets, either by directing payment or a sale of the land.

On final hearing on bill, cross-bill, answers and proofs.

Mr. A. Q. Keasbey, for complainants.

Mr. T. N. McCarter, for the executrix of John Laible Jr., deceased.

Mr. William H. Morrow, for August Stengel and others, defendants.

NOTE.—An executor, as such, has no power to mortgage the lands of his testator (*Ford v. Russell*, *Freem. (Miss.) Ch.* 42); nor an administrator (*Green v. Sargeant*, 23 *Vt.* 466); nor a substituted trustee (*Tyson v. Latrobe*, 42 *Md.* 325; *Belote v. White*, 2 *Head* 703); nor can an executor take lands in payment of debts due to his testator (*Allen v. De Witt*, 3 *N. Y.* 276; *Weir v. Humphries*, 4 *Ired. Eq.* 264; nor convey lands to pay testator's debts (*Russell v. Russell*, 36 *N. Y.* 581; see *Goode v. Comfort*, 39 *Mo.* 313; *Close v. Van Husen*, 19 *Barb.* 505); nor is mortgaging the natural way of paying debts (*Andrew v. Wrigley*, 4 *Bro. C. C.* 138).

In the following cases a power to sell land has been held to include the power to mortgage:

Earl of Oxford v. Earl of Albermarle, 15 *Jur.* 811, on a trust "to sell and dispose of all and singular, the same hereditaments and premises,

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This suit grows out of an attempt by a testator to continue his business after his death, and to control its conduct by his will. Vice-Chancellor Shadwell once remarked that every testator, by the law of the land, was at liberty to adopt his own nonsense in disposing of his property. The will brought in judgment in this case, presents a very forcible example of the extent to which it is possible for a testator to carry the exercise of this privilege.

John Laible, a brewer, of the city of Newark, died August 21st, 1862. He left a will, by which he gave his widow "the use, improvement and income of his real estate, houses and lots," during her widowhood; and, also, "all his personal property, household furniture and clothing, except all things belonging to the brewery business, to have and to hold the same to her, her heirs and assigns forever." He further directed that his son John should be the exclusive manager of his brewery business; but if it should be found, within one year, sooner or later, that, through John's neglect, wrong or default, debt had been made, or loss sustained, then the business should be let out or sold, just as his executors, with the consent of his widow, should see fit. The will also directed that John should receive, as

either together or in parcels, and either at public auction or by private contract," and to invest the surplus, after paying encumbrances.

Duval's Appeal, 38 Pa. St. 112, a devise of a residue of lands to be sold at public or private sale, the proceeds to be applied to the payment of debts not otherwise provided for, and the surplus to be divided among testator's children, authorizes a conveyance to the executrix to enable her to mortgage the property conveyed, in order to raise money to pay debts.

Britton v. Lewis, 8 Rich. Eq. 271, "to sell all my visible property in such manner as they (the executors) shall think most advantageous; out of the proceeds I wish my debts to be paid, and the rest I give to my children."—*Held*, to authorize a sale and the taking of a mortgage for the entire purchase-money. Also, *Sollee v. Croft*, 7 Rich. Eq. 34.

Bogert v. Hertill, 4 Hill 492, "for the more easy and equal division of my estate, I do hereby fully authorize and empower my executors hereinafter named, whenever they shall think it expedient, to sell and dispose of all or any part of my real estate for the most moneys that can be gotten for the same, &c."—*Held*, that a sale of part of the lands and

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compensation for his services as manager, five per cent. on the amount of annual sales; also, that he should receive, for spending-money, one cent from every dollar's worth of beer sold; and, also, that he should have his fuel furnished without charge, and a dwelling-house free of rent. It also provided, that if the brewery business should be well managed, and have good progress, it should be sold to his sons John, Philip and William, for a reasonable price, when the two latter attained the age of nineteen years; and that, in case of his widow's death before Philip and William attained the specified age, John was to be associated with the remaining executors in the conduct of the brewery business. Power was given to his executors to invest the interest or profits which they should receive from the brewery business, on bond and mortgage, or in the purchase of real estate; but if they determined to purchase real estate, they were not to purchase anything unless they could pay cash for the whole. The will then added: "And they shall also have the power to sell, but in all such transactions the hereinafter-named executors and my wife, Johanna, shall all agree in such transactions." A legacy of \$1,000 is given to one of his eight children, and \$1,250 to each of the other seven. The will also provides that, in case the widow shall marry again, she shall receive \$500

taking a bond and mortgage for the purchase-money, was valid, and also one executor's assignment of the mortgage. See *Leggett v. Hunter*, 19 N. Y. 445; *Mathews v. Dragaud*, 3 Desauss. 25.

Campbell v. Low, 9 Barb. 585, a deed of trust gave to the *cestui que trust*, a married woman, full power of disposition ("to convey and assure") of the estate, with her husband's assent.—*Held*, that a mortgage was a good execution.

Wayne v. Myddleton, 2 Ga. 383, a trust deed authorized a married woman, by and with the consent of her trustee, to sell and dispose of the trust estate whenever she deemed proper, and to re-invest the proceeds upon like trusts.—*Held*, to justify a mortgage to secure part of the purchase-money of lands and slaves bought by her. *Peace v. Spierin*, 2 Desauss. 460; *Short v. Battle*, 52 Ala. 456; *Sampson v. Williamson*, 6 Tex. 102. CONTRA, *Marvin v. Smith*, 56 Barb. 600; *Head v. Temple*, 4 Heisk. 34; *Leavitt v. Pell*, 25 N. Y. 474; *Hoggatt v. White*, 2 Swan 265.

Zane v. Kennedy, 73 Pa. St. 182, "to sell and convey, by all lawful assurances and conveyances, all or such parts of the said hereby-granted estate, as the said M. shall, by writing, under her hand, request, &c."

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each year thereafter, but her husband shall be considered as if he was not in existence, and then adds: "If my widow should die as my widow, then the real and personal property then remaining shall go to my grandchildren. I do hereby order that there shall be no difference between my children now in existence." No further or other gift or disposition is made. The widow and two other persons were appointed executors, and, by the clause appointing them, this power is added: "And I do hereby authorize and empower my executors to make purchases or sales in the above-stated cases."

Though the obscurity which covers some of the testator's purposes is so dense as to defy all efforts to penetrate it, still, I think it is very clear that he intended his business to be continued after his death. There can be no doubt that his directions to that end were sufficiently plain and positive to justify his executors in permitting it to be continued. It was continued for nearly ten years. For more than half that period it was carried on prosperously. It was also largely increased in volume. A part of the profits were used in erecting new and larger and more substantial buildings on the brewery premises, and in enlarging and improving the means of conducting the business. The sum expended for these purposes is estimated at \$50,000. At

In the following cases, in addition to those referred to in the opinion, such power has been held not to include the power to mortgage:

Page v. Cooper, 16 Beav. 396, "to sell and dispose" [of lands] and out of the proceeds "to levy, raise and pay" two sums, and to invest the residue for two persons for life, with remainder to their children.

Wool v. Goodridge, 6 Cush. 117, a power to buy and sell real and personal property, and to execute and deliver deeds to transfer the same, &c., &c. Also, *Morris v. Watson*, 15 Minn. 212.

Albany Fire Ins. Co. v. Bay, 4 N. Y. 9, a trust of lands "to sell and dispose of such parts, in fee-simple or otherwise, as T., by writing, under her hand, should from time to time request or desire."

Coutant v. Servoss, 3 Barb. 128, a trust of lands "to grant, bargain, sell and convey those lots, or any part thereof, for such sum or sums, and at such times, as to him should seem proper, and to make and execute all necessary conveyances in the law for the same, for the benefit of said infants."

Tyson v. Latrobe, 42 Md. 325, "to sell and dispose of the trust property

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the time of the testator's death, his business was mainly carried on on a lot one hundred feet in width, extending from Belmont avenue to Charlton street. He also owned two lots immediately adjacent, one on the north of the brewery premises, and the other on the south. That on the south was fifty feet in width, and contained the dwelling in which he resided at the time of his death. The other was larger, being one hundred and twenty-five feet in width, and, at the time of the testator's death was, in part, occupied by a tenant. He purchased it in 1859. He afterwards took down a fence which separated it from the brewery premises at the time of his purchase, and built another in the same place, which was standing when he died. Shortly after the testator's death, a brick stable was erected on this lot, with the receipts of the brewery, which has since been used by the business. During the years 1866 and 1867, a large brick dwelling-house was also erected on this lot, at a cost of over \$20,000, which was paid for out of the receipts of the business.

The complainants furnished nearly all the malt used in the business carried on under the will. In the spring of 1871, there remained a balance due to them of over \$85,000. On the 2d day of December, 1871, the executors, under power alleged to have been conferred by the will, conveyed

and premises aforesaid, and to apply the purchase-money by re-investment in such other property as to her may seem best, &c."

Hubbard v. German Catholic Cong., 34 Iowa 31, a religious society authorized a committee to sell a certain piece of land to pay the debts on another tract.

A power of sale gives no right to exchange (*Ringgold v. Ringgold*, 1 Harr. & Gill 11; *King v. Whiton*, 15 Wis. 684; *Taylor v. Galloway*, 1 Hamm. 104; *Cleveland v. State Bank*, 16 Ohio St. 236; see *Wadsworthville School v. McCully*, 11 Rich. 424; *Carrington v. Goddin*, 13 Gratt. 587); or to confess judgment (*Hunt v. Townshend*, 31 Md. 336); or to accept an equitable claim of the grantee in part payment (*Waldron v. McComb*, 1 Hill (N. Y.) 111); or to make a deed of trust with power in the trustees to sell as they deem advisable (*Smith v. Morse*, 2 Cal. 524); or to convey by attorney (*Black v. Erwin*, Harp. 411; 2 Wins. on Ex'rs 944); or to make partition (*Borel v. Robbins*, 30 Cal. 408; *Perry on Trusts* § 769; *Woodhull v. Longstreet*, 3 Harr. 405, 419; see *Att'y-Gen. v. Hamilton*, 1 Mudd. 122).

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the brewery premises, with the two lots adjacent on either side, to Christopher Wiedenmayer, who, on the 1st day of January, 1872, in conjunction with the widow, Johanna Laible, executed a mortgage to the complainants on the same premises, to secure the payment of \$65,000 of this debt. The balance of the debt was relinquished in order to get security for the \$65,000.

The primary purpose of the present suit is to compel the payment of this mortgage by a sale of the mortgaged premises. The validity of the mortgage, so far as it affects the estate of the widow, is not questioned. The complainants are entitled to a decree against her. The more important question is, Has it any force against those who are entitled to the fee? It is not necessary to stop to inquire who they are—that question was not spoken to on the argument—it is enough for present purposes to know that all persons now in being, who can claim any estate or interest in the mortgaged premises, are before the court as parties to this suit. The proofs show, quite incontestably, that the conveyance to Wiedenmayer was not made in consummation of an actual sale, but was a mere contrivance to enable him to execute a mortgage to the complainants. He accepted it under an arrangement that he should execute a mortgage to the complainants, and then reconvey the lands. It is not pretended that a contract of sale and purchase was made, or that any price was agreed upon, or consideration paid or given, other than the execution of the mortgage to

Under a power of sale, executors may sometimes grant leases (*Jervoise v. Clark*, 6 Madd. 96; *Scymour v. Bull*, 3 Day 388; *Hedges v. Riker*, 5 Johns. Ch. 163; *Prather v. Foote*, 1 Disn. 434; *Williams v. Woodward*, 2 Wend. 487; *Burr v. Sim*, 1 Whart. 266; *Blake v. Sanderson*, 1 Gray 333; see *Bonney v. Ridgard*, Cox Ch. Cas. 145; *Simpson v. Bathurst*, L. R. (5 Ch. App.) 193; *Mitchells v. Corbett*, 34 Beav. 376; *Hubbard v. Elmer*, 7 Wend. 446); and they may sell by executory contract (*Demarest v. Ray*, 29 Barb. 563; *Shippen v. Clapp*, 29 Pa. St. 265; see *Ives v. Davenport*, 3 Hill 373); and either at public or private sale (*Huger v. Huger*, 9 Rich. Eq. 217; *Perry on Trusts* § 770; see *Jackson v. Williams*, 50 Ga. 553); or make a conditional sale (*Isaac v. Farnsworth*, 3 Head 275); but a mere quit-claim deed is no execution (*Towle v. Ewing*, 23 Wis. 336).

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the complainants. Indeed, the parties to the transaction did not take the trouble to put on it the guise of a sale. No reference to authorities is required to show that this was not a valid exercise of the power given by the will. The executors were entrusted with power to make sale of the brewery premises, in a certain contingency, but no power to donate the property, nor to create preferences against it in favor of certain creditors, to the exclusion of others. If the executors used the power at all, they were bound to keep within its terms, and any attempt by them to exercise power in excess of that delegated, must be held to be simply nugatory. Where the creator of a power defines the method of its execution, that method must be strictly followed, so far, at least, as may be necessary to give effect to his intent and design. This rule is fundamental. It is clear the conveyance to Wiedenmayer passed no title.

This being so, is it possible to uphold the complainants' mortgage? They are not innocent purchasers for value. They accepted the mortgage as security for a pre-existing debt; they neither paid nor surrendered anything of value, nor did they enter into a new and irrevocable obligation. Besides, one of them admits that he understood that Wiedenmayer had taken title to the mortgaged premises merely for the purpose of settling their claim, and to put himself in a position where he could assist in the settlement of the estate. This was quite sufficient notice of the real character of the transaction to deprive them of the character of innocent purchasers for value.

The court may sometimes authorize a mortgage of lands in order to pay debts or legacies (*Selby v. Cooling*, 23 Beav. 418; *Holme v. Williams*, 8 Sim. 557; *Williamson v. Field*, 2 Sandf. Ch. 533; see, however, *Brown v. Dusee*, 44 Vt. 529; *Mileage v. Bryan*, 49 Ga. 396; *Patapsco Co. v. Morrison*, 2 Woods 395); whether they would authorize a lease (*Treat v. Peck*, 5 Conn. 280); but the court will not order a sale where only a power to mortgage is given (*Drake v. Whitmore*, 5 DeG. & Sm. 619).

Whether a mortgage exhausts a power of sale (*Elliott's Case*, 5 Whart. 524; *Asay v. Hoover*, 5 Pa. St. 21; *Piatt v. Oliver*, 2 McLean 309); but executors are estopped by a mortgage (*People v. Miner*, 37 Barb. 466; *Ryder v. Sisson*, 7 R. I. 341; *Barker v. McAuley*, 4 Heisk. 425); see, further, 1 Am. Law Reg. 128.—REP.

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But it was very plausibly argued by the counsel of the complainants, that the power to sell, conferred by this will, embraces, also, a power to mortgage, and that if he was right in this contention, the mortgage should be upheld as within the power, for, although not executed by the executors themselves, yet, having been executed by their grantee, to whom they conveyed the mortgaged premises for the purpose of having them mortgaged to the complainants, it should, in a court which deals mainly with the substance of transactions, regardless of mere questions of form, be treated as the deed of the executors. My judgment rejects both propositions as thoroughly unsound. The last is much too devious, and too strongly marked by false suggestions, if not actual falsehood, ever to be recognized as the fit foundation of a judicial conclusion.

The other presents a question of legal construction. At one time it was held, by the English court of chancery, that a power to sell implied a power to mortgage, which, it was held, was a conditional sale. *Mills v. Banks*, 3 P. Wms. 9; 1 Sug. on Pow. 513. As late as 1838, Lord Coltenham declared: "So long ago as the case of *Mills v. Banks*, decided in 1724, it seems to have been assumed as settled, that a power to sell implies a power to mortgage, which is a conditional sale; and no case has been quoted throwing any doubt upon that proposition." *Ball v. Harris*, 4 Myl. & Cr. 267. But this was the last occasion on which the doctrine was ever re-affirmed as broadly as stated by Lord Macclesfield in *Mills v. Banks*.

Lord Langdale, as master of the rolls, held, in *Haldenby v. Spofforth*, 1 Beav. 391, decided in 1839, that a power of sale did not necessarily imply a power to mortgage, and should never be construed to do so, except where it was clear that the creator of the power meant the estate should be preserved, if possible, and merely gave direction to sell as a means of raising money to answer a particular charge, which could be just as well and as conveniently accomplished by a mortgage as a sale.

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Lord St. Leonards laid down the rule substantially in the same form, in *Stronghill v. Anstey*, 1 DeG. M. & G. 645. He says: "Generally speaking, a power of sale, a power of sale out and out, for a purpose, or with an object beyond the raising of a particular charge, does not authorize a mortgage; but where it is for raising a particular charge, and the estate is settled or devised subject to that charge, there it may be proper, under the circumstances, to raise the money by mortgage, and the court will support it as a conditional sale, as something within the power, and as a proper mode of raising money." This view was adopted by Sir J. Romilly, master of the rolls, in *Devaynes v. Robinson*, 3 Jur. (N. S.) 707, 24 Beav. 86. Even a more rigid adherence to the intent of the creator of the power, as shown by his words, is required by the New York rule. There, a simple power of sale, no matter what its special object may be, will, in no case, authorize a mortgage. The court, in *Bloomer v. Waldron*, 3 Hill 361, said: "When the power is to sell, and something is added over and above, showing that the power of sale is not to be taken in its primary sense, but means a power to mortgage, there the donee may act accordingly. The principal may make his own vocabulary. He may say: 'I authorize a sale, by which word I intend a mortgage.'" When a man directs a sale of his land, whether his object be to raise money for a particular purpose or not, he means to put it in the market for what it will fetch, and avoid the fluctuation of prices. There is a substantial difference between raising money by a mortgage and a sale. The rule is well established, that where one of several methods of executing a power is clearly prescribed by the language of the power, the donee is not at liberty to adopt another, for, by prescribing one, the others are negatived. Under these rules, it is not possible to read the will, in this case, so as to give the executors power to mortgage. In my judgment, the complainants' mortgage is without legal force, except against the estate of the widow.

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But this conclusion does not dispose of the whole case; the complainants make a further claim. They assert that the testator, by directing the continuance of his business, embarked his estate in trade, and thereby created a trust, and they, having become creditors of the trust, have a right to ask that it shall be administered in such manner that their debt shall be paid. It has already been decided that so much, and no more, of the testator's estate, as he directed should be employed in the continuation of his business, with the accumulations thereon, stands charged in equity with the debts properly contracted in its prosecution, and that creditors have a right in the first instance, without first exhausting their remedy against the executors personally, to resort to the trade property for the payment of their debts. *Ferry v. Laible*, 12 C. E. Gr. 146. The justness of this conclusion and its correctness as a legal proposition, were not questioned on the final argument.

The main point of difficulty which this branch of the case presents is, What shall be considered trade property? What part of his estate did the testator intend to embark in the brewery business? The answer admits that he carried on the brewery business on the lot one hundred feet in width, extending from Belmont avenue to Charlton street. At the time of his death, the whole of this lot was devoted to the purposes of his business; it contained the brewery, the cellars, and other necessary buildings and appliances of the business. In view of the nature and requirements of his business (land and buildings being indispensable to its prosecution), of the uses to which he had devoted this lot, and of his direction that his business should be continued in order that it might be preserved and eventually made the property of his three sons, there can be no doubt as to his purposes in respect to this lot; he meant that it should be the home of the business he wanted fostered, and that it should ultimately go, with the business, to his three sons.

His purposes in respect to the large lot on the north, the one on which the new dwelling was erected, can be dis-

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cerned with equal certainty. He separated that from the brewery property by a fence, and treated it as a thing entirely distinct from the brewery premises, and as having no connection with the business he wanted to perpetuate. It is manifest, to my mind, that he did not mean to embark this lot in his *post mortem* venture.

His will in respect to the other lot is not so clear. I think, however, he intended to embark it in the business, and that it should pass to his sons as part of the property he wished sold to them. It was connected with, and used in connection with, the brewery premises. Some of his workmen, employed in the brewery, lived with him in the dwelling on this lot, and there was a passage-way leading directly from the dwelling into the brewery. It will also be remembered that the will directs that the manager of the business shall be furnished with a dwelling-house free of rent, as part of his compensation. The testator had resided on this lot, where his business was constantly under his eye, and where he could at all times give it such care and attention as were necessary to its proper conduct and security. It is reasonable to believe that he desired that the person who should control it after his death, should be in a position where he could give it the same constant care and attention. It is quite obvious that the most important purpose of the testator's testamentary scheme was the perpetuation of his business, and we are bound to read his will in the light of this important fact. In view of all the circumstances of the case, I am convinced that he intended the manager should occupy the dwelling on this lot free of rent. This, in my opinion, was a sufficient embarkation of the lot in the trade, to render it subject to the debts of the trade.

In cases of this character, I think the court is bound, as a matter of common justice, to extend relief to creditors with a liberal hand. According to the usual course of business, brewers' materials purchased in the fall are not paid for until the following summer, after they have been

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converted into beer, and the beer sold. In this case the testator intended the business should be carried on on credit; at least, he did not provide a capital for it, but, on the contrary, he gave all his personal property to his wife, except the things belonging to the brewery. Hence it would seem to be quite clear that he expected it to be carried on on credit, according to the usual course of the trade. The law, in its benignity, believes every man to be honest until the contrary is shown. If the court finds a testator has directed a debt to be contracted, it must believe that he intended it should be paid. Here the testator has directed that his business shall be continued after his death. That direction gives expression to the most cherished purpose of his testamentary scheme. Under the provisions of his will, it could not be observed unless debts were contracted. By the continuation of his business, he undoubtedly hoped his bounty to his beneficiaries would be very largely increased. Either ignorantly or designedly, he has made no express disposition of the bulk of his estate except in the contingency that his widow shall die without having contracted a second marriage. In this condition of affairs, it has seemed to me that it would hardly be too much to say, if we impute to the testator the rectitude of purpose which the law imputes to him, that there is some reason to believe that he intended that all his property not transferred and indefeasibly vested immediately on his death, should stand pledged for all debts fairly contracted in conducting his *post mortem* enterprise. However, I am not prepared to adjudge that that is the measure of relief to which creditors are entitled in this case. The lot on the south of the brewery premises, I think, was embarked in business, and constitutes part of the trade property.

Another question remains: Have the creditors any remedy for the recovery of the moneys which have been wrongfully expended in making improvements upon lands not embarked in the trade? The money thus expended, undoubtedly constituted part of the property equitably

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bound for the payment of their debts. If it had been invested upon mortgage, or in the purchase of land, pursuant to the direction of the will, their right to have it applied in satisfaction of their claims would be so clear that it would require something more than courage to dispute it. A testator, by a direction to continue his trade or business, creates a trust estate which the court will keep separate and apply exclusively to the purposes of the trust. *Owen v. Delamere*, 15 Eq. Cas. 139. This is the foundation doctrine of all the cases. *Ex parte Richardson*, 3 Madd. 138; *Thompson v. Andrews*, 1 Myl. & K. 116; *Cutbush v. Cutbush*, 1 Beav. 185; *McNeilie v. Acton*, 4 DeG. M. & G. 744.

Lord Eldon declared that the right of creditors to have the trade property applied to the payment of their claims, very closely resembled a lien. *Ex parte Garland*, 10 Ves. 120. The persons having the control of the moneys thus expended were trustees; the moneys were subject to a trust, not only in favor of the beneficiaries under the will, but also in favor of creditors. The application or use they made of the moneys was an abuse of their trust, at least against creditors, and a fraud upon their rights. An abuse of trust can confer no rights on the person guilty of the abuse, nor on those who claim in privity with him, simply as donees. No change in the form or nature of the trust property will divest the trust or impair the rights of the *cestui que trust*. Lord Ellenborough said, in what has been appropriately styled his masterly judgment, in *Taylor v. Plumer*, 3 Mau. & Sel. 575: "It makes no difference in reason or law, into whatever form different from the original the change has been made, for the product of or substitute for the original still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and merged and confounded in a general mass of the same description. The difficulty which arises, then, is a difficulty of fact, and

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not of law." This is the established law of this state. *Shaler v. Trowbridge*, 1 Stew. 595.

The only duty remaining is, to apply the legal rule just quoted. This duty, in my judgment, is not embarrassed by any difficulty of fact. It is indisputed that certain moneys subject to a trust in favor of creditors, have been converted into buildings erected on lands belonging to persons who had no right to the moneys as against creditors. If they are permitted to retain the buildings without paying for them, or making restitution in any other form, they will be allowed to withhold, against the rightful owners, the proceeds of a breach of trust, committed by their ancestor for her and their joint benefit, and that, too, when the product of or substitute for the trust property, is not only plainly distinguishable, but is, figuratively speaking, before the eyes of the court, and can, according to its established methods of procedure, be estimated and valued, and sequestered for the benefit of the rightful owners. Under such a state of facts, there ought to be no doubt as to the power of the court. There is no difficulty in ascertaining the value of the buildings, or of the land in which they are incorporated. It is familiar practice, in actions for partition, to direct an inquiry to ascertain the value of improvements, where one tenant in common has erected buildings on the lands held in common, and, in case of a sale, to decree compensation to him out of the proceeds of sale. *Hall v. Piddock*, 6 C. E. Gr. 311; *Doughaday v. Crowell*, 3 Stock. 201; *Obert v. Obert*, 1 Hal. Ch. 397; *Brookfield v. Williams*, 1 Gr. Ch. 341. There is no alchemy in the mere fact of incorporation. The rule of practice just mentioned was an invention of equity to remedy injustice and prevent the loss of rights. It is peculiar to no special form of action but may be adopted in any case whenever it is necessary to the promotion of justice.

In any ordinary case, where the owner of the land involved was of full capacity, and in a position to protect himself, the proper course of procedure, I think, would

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to direct an inquiry to ascertain the amount of trust funds wrongfully expended, and, when this fact was found, to decree its payment, or, in case of default, that the land should be sold. That course is impracticable in this case, but this one will be adopted: If it shall hereafter appear that the funds wrongfully expended in the construction of buildings are necessary for the payment of the debts of the trade, a sale of the land, with the buildings, will be ordered. After the sale, a reference will be ordered to ascertain the full market value of the land, exclusive of the buildings, and without reference to the sum bid at the sale; the sum thus ascertained as the full market value of the land, will be set apart out of the proceeds of sale, for the benefit of the persons who may appear hereafter to be entitled to the land, and the balance will be applied in liquidation of the debts. This course will give the beneficiaries under the will all they were ever entitled to, and all they can ask, if they are honest, and will give the creditors such protection as may be awarded to them, without possibility of wrong to others.

John Laible Jr., the manager appointed by the will, died in March, 1873. His representative is before the court, by cross-bill, seeking to have the balance due for his compensation under the will, declared a lien on the trade property and assets. I know of no rule, legal or equitable, which will sustain this claim. None was mentioned on the argument which, in my judgment, gives it the least support. In the absence of a pledge, or contract, or some special equity entitling one creditor to preference over another, equality is always equity. That maxim must prevail in this case. All creditors occupy the same rank. If there is enough to pay each in full, all must be paid; if not, the assets must be distributed among them equally, in proportion to the amount of their respective debts. This suit is, in fact, a suit by a creditor for the discovery of assets held in trust for creditors, and to have the trust executed and the assets properly administered. It must be so treated.

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My conclusions upon the whole case are:

First—The complainants' mortgage is valid against the estate of the widow, but invalid against every other estate attempted to be charged thereby.

Second—The trade property and assets, including all gains which have been made thereon, constitute a fund which equity will treat as pledged for the payment of all debts properly contracted in the trade.

Third—The real estate embarked by the testator in the continuation of his business, consisted of the first and second tracts described in the complainants' bill; these, with the implements, fixtures and personal property of the business, whether owned by the testator at the time of his death or purchased with the proceeds or property of the trade since, should be held to be the trade property proper, and should be converted into money, under the direction of the court, and be applied first, and before resort is had to any other fund for the payment of the debts.

Fourth—All the creditors of the business are entitled to share *pro rata* in the distribution of its assets, in case they are not sufficient to pay all in full, and to that end an inquiry should be ordered to ascertain who they are, and the amount of their respective claims.

Fifth—If sufficient money is not realized from the trade property and assets proper, to pay all the debts, together with the costs and expenses of administration, resort should be had, in the mode already indicated, to the building erected with the moneys of the trade.

The decree should be settled, upon notice.

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THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

v.

JOHN NORRIS.

1. To constitute an equitable estoppel, the defendant must have done an act, or made an admission, the natural effect of which was to influence the conduct of the complainant, and which has induced him to change his position or condition, so that, if the defendant is afterwards permitted to deny the truth of his words or conduct, the complainant must suffer harm.

2. Where the complainant's act (which he says he was induced to do by the defendant's representation or act) appears to be rather the result of his own will or judgment than the product of the defendant's representation or act, there can be no estoppel.

On final hearing on bill, answer and replication, and proofs taken orally.

Mr. E. Q. Keasbey, for complainants

Mr. Robert S. Green, for defendant.

THE VICE-CHANCELLOR.

This is a foreclosure suit. No question is raised as to the validity of the complainants' mortgage; the dispute is confined to the complainants' right to tack to their mortgage debt a payment made by them in discharge of an assessment imposed upon the mortgaged premises by the municipality within which they are situate.

The mortgage provides that the defendant shall pay all taxes, charges and assessments imposed by law upon the mortgaged premises, as soon as the same become payable, and that, in case he does not, it shall be lawful for the complainants to pay them and add them to the debt secured by their mortgage. The mortgaged premises are situate in the city of Elizabeth. Prior to the execution and registry of the complainants' mortgage, the mortgaged premises were

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assessed with part of the cost of a pavement laid on a street adjacent to them, and they were subsequently sold to the city for a term of years, for the payment of this assessment. This assessment is the subject of the dispute in this case. They were also sold several times, after the execution of the complainants' mortgage, for the payment of other impositions. These sales did not, without additional action, affect the complainants' rights. The charter provides that the rights of a mortgagee, whose mortgage shall have been recorded before a sale for a tax or assessment is made, shall not be divested until he has had six months' written notice of the sale, and an opportunity to redeem. Such notice was given to the complainants, and they thereupon required the defendant to pay the assessment in controversy, and also the other charges for which the mortgaged premises had been sold. They aggregated over \$2,000. The defendant professed inability to comply with this requirement, but stated that if the complainants would make him a further loan, to be secured by the pledge of other real estate, the money should be used to pay these burdens. To this end he made a formal application for another loan, upon a stipulation that, if it was granted, the money should be applied as already stated. His application was rejected, and the complainants afterwards paid the assessment in dispute, and also the other charges in arrear, and took an assignment of the rights of the city against the mortgaged premises.

At the time these transactions took place, both parties regarded the assessment in question as valid. Subsequently, the court of errors and appeals declared that that portion of the charter, by force of which it was imposed, was a nullity. *Bogert v. City of Elizabeth*, 12 C. E. Gr. 568. This adjudication deprived the assessment of all legal warrant. Unless, therefore, the complainants can show something in support of their claim, possessing greater efficacy than the law under which the assessment was made, they are not entitled to recover. They insist that the defendant's application for a loan, accompanied as it was by a promise that the money

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should be used to pay the assessment, was such an admission of its validity as will, in equity, preclude him, after they have acted on it, from disputing it.

They rest their right to recover on an equitable estoppel. To constitute such an estoppel, the defendant must have done an act or made an admission, the natural effect of which was to influence the conduct of the complainants, and which has induced them to change their position or condition, so that, if he is now permitted to deny the truth of his words or conduct, the complainants must suffer harm. Justice Elmer, in *Phillipsburg Bank v. Fulmer*, 2 Vr. 55, said: "To constitute an estoppel *in pais* there must be an admission intended to influence, or of such a nature as will naturally influence, the conduct of another, and so change his condition as materially to injure him if the party making it is allowed to retract it." In the case under consideration, both parties seem to have acted in ignorance of what the actual state of the law was. Where both parties have equal opportunities of knowledge, and they both act in ignorance of the real state of the case, and the complainant's act, which he says was induced by the defendant, appears to be rather the result of his own will or judgment than the consequence of the defendant's act or representation, there can be no estoppel. *Baldwin v. Richman*, 1 Stock. 399; *Richman v. Baldwin*, 1 Zab. 403. The main purpose of the doctrine is to prevent fraud; there can, therefore, be no estoppel without fraud, either actual or legal. Hence, to impart this virtue to a representation, it must be made by a person with knowledge of the truth, or, what is the same thing in legal ethics, by a person whose duty it is to know the truth, to one who is ignorant of it. And he must make it with the intention of influencing the conduct of another, or under such circumstances as to show that he had reason to believe, when he made it, that it would influence the conduct of another. *Kuhl v. Jersey City*, 8 C. E. Gr. 84. He who seeks to take advantage of an estoppel, must show that he has been

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misled by the works or conduct of another. *Deweese v. Manhattan Ins. Co.*, 6 Vr. 366.

The case made against the defendant is, in my judgment, devoid of every element of an estoppel. The complainants paid, not because they reposed confidence in the defendant's judgment or representation that the assessment was valid, but because they themselves thought it was valid, and that its payment was necessary to preserve their rights. In the whole of the business the complainants were represented by a lawyer distinguished alike for learning and acumen, and it is quite incredible that either he or they were influenced in the slightest degree by any statement of a legal proposition which the defendant may have made, either directly or inferentially. It is much easier to believe that the defendant was influenced by the complainants' conduct than that their action was induced by his. His application for a loan was the natural result of their demand upon him to pay, and when their counsel urged him to pay the assessment, he had a right to understand that their counsel knew of no reason why it should not be paid, and of no ground upon which its validity could be assailed.

The complainants are only authorized to add to their mortgage debt payments which they have made in discharge of burdens imposed upon the mortgaged premises by authority of law; the payment in question having been made in discharge of an imposition made without legal warrant, is not recoverable.

HUGH J. JEWETT, receiver of the Erie Railway Company,
v.

SIGMUND DRINGER and another.

1. This court cannot entertain a bill of review to revise a decree entered here upon remittitur from the court of errors and appeals, reversing the decree of this court.

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2. But this court may, upon a sufficient case being made under an original bill, give relief against the judgment of any judicial tribunal.

On petition for leave to file a bill of review.

Mr. A. B. Woodruff, for petitioner.

Mr. Cortlandt Parker, contra.

THE VICE-CHANCELLOR.

This case is again before this court. When heard here originally, the complainant's bill was dismissed as to both defendants (2 *Stew.* 174). From that judgment the complainant appealed, and the appellate tribunal reversed it as to the defendant Sigmund Dringer, and affirmed it as to the other defendant (3 *Stew.* 291). Since then a decree has been made in this court against Dringer, in conformity to the judgment of the court of last resort. Dringer now applies for leave to file a bill of review, for the purpose of having this court review the decree entered here upon the remittitur from the higher court. His application rests upon two grounds—fraud in the procurement of the judgment against him, and newly-discovered evidence.

NOTE.—In *Needler v. Kendall*, *Finch* 468, on an appeal from a decree in chancery to the house of lords, the appellants petitioned to be allowed to examine witnesses, but the petition and appeal were both dismissed. On a subsequent bill of review in chancery,—*Held*, that the defendants must answer or demur thereto.

In *Bleight v. McIlvoy*, 4 *Mon.* 142, an order dismissing a bill of review in a lower court, after an affirmance above, was affirmed on the ground that although such bill would lie, yet the complainant had not shown himself aggrieved by its dismissal.

In *Singleton v. Singleton*, 8 *B. Mon.* 340, a verdict of a jury on an issue out of chancery, as to the validity of a will, affirmed by the court of appeals, was held not to prevent infants, interested in the estate, and not made parties before, from filing a bill of review below, in order to set up new facts. See *Brown v. Keyser*, 53 *Ind.* 85; *Brewer v. Bowman*, 3 *J. J. Marsh* 394.

In *Bush v. Madeira*, 14 *B. Mon.* 212, an order granting a demurrer to a bill of review filed below, after an affirmance of a previous order of

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Has this court power to give the petitioner what he asks? The solution of this question depends on the answer which must be given to another: Whose judgment is it he seeks to have reviewed—the judgment of this court, or that of the court of errors and appeals? This court may, undoubtedly, review its own judgments, and the appropriate method, to that end, is a bill of review. The judgments of all other judicial tribunals may also be impeached in this court, for fraud. *Davis v. Headley*, 7 C. E. Gr. 115; *Doughty v. Doughty*, 1 Stew. 581. This court will also grant relief against a judgment at law, on the ground that a fact material to the merits has been discovered since the trial (but too late to be available at law), which could not, by ordinary diligence, have been discovered before. *Mulock v. Mulock*, 1 Stew. 15; *Kerr on Inj.* 23. But, in such cases, the party claiming to be aggrieved must ask relief by original bill, and exhibit a case which, as an independent matter of equity cognizance, entitles him to relief. To this extent, I suppose, the judgments of every judicial tribunal of this state, whether superior or inferior, are subject to review in this court.

But the petitioner does not seek to attack the judgment in question by an original bill. He asks leave to proceed

the chancellor, such bill of review being applied for on the ground of newly-discovered evidence, was reversed. See *Bennett v. Brown*, 56 Ga. 216.

In some states, it is regulated by statute. *Parker's Appeal*, 61 Pa. St. 478; *Longworth v. Sturges*, 4 Ohio St. 690; *Enos v. Boardman*, 2 Tyler 271.

In *Lyon v. Merritt*, 6 Paige 473, an order of the court of appeals, affirming one by the chancellor, directing that a note should be cancelled, was held to be conclusive unless leave to apply to the chancellor for a modification had been reserved above. Also, *Utica Ins. Co. v. Lynch*, 2 Barb. Ch. 574; *Dodd v. Astor*, Id. 395; *White v. Atkinson*, 2 Call 376; *Price v. Campbell*, 5 Call 115.

In *Clayton v. Wardell*, 2 Bradf. 1, a decree of the surrogate as to the legitimacy of one C. A., was reversed by the court of appeals, and the cause remanded for an accounting &c.—*Held*, that an application below to furnish additional proofs as to C. A.'s legitimacy must be denied. Also, *North Carolina R. R. Co. v. Swepson*, 73 N. C. 316.

In *Campbell v. Price*, 3 Munf. 227, a mistake was made in entering a decree of affirmance by the court of appeals, the amount of the decree

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by an entirely different method. If the judgment sought to be reviewed had remained in the court of errors and appeals, and was now in course of execution there by the process of that tribunal, I take it to be too clear for argument, that this court could not, by bill of review, revise, change or affirm it. Because it is remitted to this court *to be carried into effect here*, does it thereby become subject to the control of this court for revision, reversal or correction, or any less the judgment of the court pronouncing it? The court of errors and appeals is not a court of final process, but when a cause is finally determined there, the judgment is remitted to the court of original jurisdiction in which the cause originated, merely for the purpose of being carried into effect. *Gardner v. State*, 1 Zab. 557. It becomes a judgment in the court of original jurisdiction for that purpose and no other. With respect to causes going up on appeal from this court, the direction of the law is, that after the court of errors and appeals shall have finally decided a cause, the record shall be remitted to this court, together with a copy of the order or decree of the court of errors and appeals, *which order or decree it shall be the duty of the court of chancery to carry into effect* (Rev. 215 § 15). This court must carry such order or decree into effect according

being thereby stated to be payable in currency when it ought to have been sterling. On subsequent application to the chancellor, he corrected the error; but, on appeal, this order was reversed. The complainant then filed a bill of review before the chancellor, both on the original decree and subsequent order. To this bill the defendant demurred. The bill of review was thereupon dismissed, and this order of dismissal affirmed on appeal. See *San Francisco Sav. Soc. v. Thompson*, 34 Cal. 76.

In *Rice v. Carey*, 4 Ga. 558, after a decree had, a bill of review thereon was filed, to which defendant put in a demurrer which was overruled, and that order thereupon appealed from. The appeal was dismissed for want of proper parties. The plaintiff then filed another bill of review on the order. To this the defendant filed a plea, that since the making of the order the plaintiff had appealed, and that the dismissal of his appeal was equivalent to an affirmance. Plaintiff's demurrer to this plea was overruled, an exception taken thereto, and error assigned.—*Held*, (1) That the former dismissal was tantamount to an affirmance. (2) That a bill of review for error apparent on the

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to its plain intent (*Snowhill v. Snowhill*, 1 Gr. Ch. 30); and in doing so it must confine itself strictly within its allotted sphere—which is the faithful enforcement of the command of the superior tribunal—and it must not, in any way, attempt to evade, impede or defeat such command. *Hale v. Lawrence*, 2 Zab. 72.

The obstacle standing across the path which this court must take to give the petitioner what he asks, seems to me to be insuperable. As already remarked, this court, under a bill of review, can only revise its own judgments. The truth of this proposition is self-evident. The judgment the petitioner seeks to have reviewed by this court, is not the judgment of this court, except for a single purpose, namely, to be carried into effect; for all other purposes it is the judgment of the court of last resort, and, as such, must be respected and obeyed by this court. It is here, not as the result of the deliberation of this court—this court reached a conclusion the exact opposite of that expressed by the present judgment—but by command of the law. Had the petitioner asked this court to proceed by bill of review to look into and revise a judgment of the court of errors and appeals, remitted to the supreme court to be carried into effect, his application would be so palpably irregular that it would be difficult not to regard it as an attempt to

face of the decree would not lie in the court below after an affirmance on appeal.

In *Winston v. Johnson*, 2 Munf. 305, a decree on a creditor's bill was affirmed above, and the cause remitted for an accounting. After the master's report, a bill of review was filed, because the report was taken *ex parte* [See *Galloway v. Galloway*, 2 Baxt. 328], and confirmed at the session following, contrary to the practice of the court, and that the decree ought not to have been against the defendants jointly. An order of the chancellor dismissing such bill, was affirmed. Also, *Haskell v. Raul*, 1 McCord's Ch. 22.

In *Dennison v. Goehring*, 6 Pa. St. 402, an order dismissing a bill of review of a decree affirmed by the supreme court on appeal, such bill setting forth error in law appearing in the body of the decree, was itself affirmed on appeal. Also, *Grant v. Ludlow*, 8 Ohio St. 1, 42.

In *Southard v. Russell*, 16 How. 547, a decree holding a certain transaction to constitute an absolute conveyance of lands, was reversed by the supreme court, which held it to be only a mortgage, and remanded the cause. Thereupon a bill of review was filed in the court below, on the

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trifle with the court; and yet, such an application would be identical, in principle, with that now before the court.

This consideration alone exhibits very clearly, as I think, the manifest inability of this court, necessarily incident to its subordinate position, to do what the petitioner asks. To my mind the question is free from difficulty as a matter of primary principle. Our government, for the proper administration and enforcement of the laws, has created several different tribunals, and assigned to each certain powers and duties. Some it has made superior to others, and to the superior it has given power to supervise the action of the others. Under such a system, unless each keeps strictly within its allotted sphere, and the subordinate yield obedience to the decrees of the superior, strife and disorder must necessarily ensue, and eventually the law will be overthrown and justice defeated.

On the argument, *King v. Ruckman*, 7 C. E. Gr. 551, was referred to as tending in its result, if not by its argument, to give countenance to the opposite view. I do not think it is possible so to understand it. On the contrary, I understand that case to declare two propositions very plainly: First, that a case once decided in a court of last resort is, as between the parties, conclusively and forever decided;

ground of newly-discovered evidence, to impeach the character of witnesses already examined. The court below dismissed the bill, and this decree was affirmed on appeal. Also, *United States v. Knight*, 1 Black 488; *Allen v. Barksdale*, 1 Head 238; *San Francisco Sav. Soc. v. Thompson*, 34 Cal. 76.

In *Stallworth v. Blum*, 50 Ala. 46, a decree given against a defendant below, was affirmed on appeal. Thereupon he filed a bill of review before the chancellor who rendered the decree, to set it aside for fraud &c. The chancellor ordered it dismissed, and this order was affirmed, on the ground that no review below lies after an affirmance. Also, *Kinsell v. Feldman*, 28 Iowa 497; *Ryerson v. Eldred*, 18 Mich. 490.

While an appeal is pending on a decree, the court below cannot grant a bill of review thereon (*Willan v. Willan*, 16 Ves. 89; *Field v. Williamson*, 4 Sandf. Ch. 613; see *Slason v. Cannon*, 19 Vt. 219; *Terry v. Commercial Bank*, 2 Otto 454); but the hearing on the appeal may be stayed (*Tomlinson v. Tomlinson*, 10 Rich. Eq. 300; *Longworth v. Sturges*, 6 Ohio St. 143); an abandonment of the appeal estops a subsequent

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and, second, that such a tribunal, in virtue of its inherent power, is entirely competent to give relief against its own judgments, if they have been procured by fraud, or are the result of misapprehension, and also to remedy mistakes and correct errors in its proceedings.

As a matter of practice, I think the question must also be regarded as settled. The only authority supporting the petitioner's view, which has come under my observation, is *McCall v. Graham*, 1 Hen. & Mun. 13. It was there held, by the superior court of chancery of the Richmond district of Virginia, that while a court of equity of original jurisdiction could not entertain a bill of review to revise the decree of an appellate court, for errors of law apparent on the face of the decree, it had jurisdiction, by means of a bill of review, to give relief against such decree if new evidence had been discovered. The court decided the question by simply asserting the power, without attempting to vindicate it by either argument or the citation of authority. Such a precedent can hardly be esteemed a safe guide. Chancellor Walworth, upon a similar application, reached the opposite conclusion. In *Stafford v. Bryan*, 2 Paige 45, 47, he said: "If this court can review, on new evidence, a decree affirmed in the court of *dernier resort*, it can also

application for a bill of review (*Bennett v. Bell*, 10 Rich. Eq. 461; *Hall v. Wolcott*, 10 Mass. 218; see *Gilchrist v. Buie*, 1 Dev. & Bat. Eq. 346, 354; *Maghee v. Collins*, 27 Ind. 83; *Benedict v. Thompson*, Walk. Ch. 446; *Person v. Merrick*, 5 Wis. 231; *Mitchell v. Berry*, 1 Metc. (Ky.) 602); the granting of a bill of review below does not prevent an appeal (*O'Hara v. McConnell*, 3 Otto 150).

The court of appeals will not grant a bill of review on one of its own decrees (*Bernal v. Donegal*, 3 Dow 133, 157; *Att'y-Gen. v. Ward*, 1 Myl. & Cr. 449; *United States v. Knight*, 1 Black 488; *Burn v. Poaug*, 3 Desaut. 616; *Perkins v. Lang*, 1 McCord's Ch. 31, note; *Johnson v. Lewis*, 1 Rich. Eq. 390; *American Bible Society v. Hollister*, 1 Jones Eq. 10; *McGregor v. Gardner*, 16 Iowa 538; *Pope v. Pope*, 4 Pick. 128; *Cox v. Breedlove*, 2 Yerg. 499; *Wilson v. Wilson*, 10 Yerg. 200; *Beazley v. Mershon*, 6 Bush 424; *Corten's Appeal*, 13 Pa. St. 292; *Lewis v. Morton*, 6 Mon. 138; *People v. New York*, 25 Wend. 252; see, however, *Barnum v. McDaniels*, 6 Vt. 177; *Carr v. Green*, Rich. Eq. Cas. 405; *Neal v. Robinson*, 1 Dick. 15; *Wynn v. Wynth*, 11 Leigh 584); but in some states such right is given by statute (*Luckett v. White*, 10 Gill & J. 480; *Pinkney v. Jay*, 12 Id. 69; *Slason v. Cannon*,

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review a decree which has been reversed there; but I doubt the authority of the chancellor to do it in either case, unless that court has expressly reserved to him that right." *Barbon v. Stearle*, 1 Vern. 416, had been cited in the case just mentioned as a precedent for the right, but Chancellor Walworth held that, when properly understood, it was an authority decidedly the other way. The bill in that case, which was partly an original bill and partly a bill of review, charged the defendant with having committed a fraud to defeat the administration of justice. It alleged that the defendant had, pending an appeal to the house of lords, suppressed a very important piece of evidence by burning a deed on which the complainant's title rested, and by that means had procured a decree in his favor. It expressly disclaimed any intention to impeach the decree of the house of lords in the court of chancery, but asked the aid of that court to compel the defendant to make discovery, in order to enable the complainant, when the house of lords should be in session, to apply to it for relief. The defendant demurred. Lord Chancellor King overruled the demurrer and ordered the defendant to answer, but directed the cause to rest at that point. It is quite obvious the suit was entertained by the court of chancery merely in aid of a proceeding to be instituted in the house of lords, as soon as it should be in session, for the detection of a fraud alleged to have been perpetrated to obstruct justice.

The case presents merely a question of method. The petitioner asks this court to review, by means of a bill of

19 Vt. 219; *Bowditch Ins. Co. v. Winslow*, 3 Gray 415; *Elliot v. Cochran*, 1 Cold. 389; *Longworth v. Sturges*, 4 Ohio St. 690, 6 Id. 143).

Another bill of review cannot be granted after one allowed or dismissed (*Denny v. Filmer*, 2 Ch. Cas. 133, 1 Vern. 135; *Pitt v. Arglasse*, 1 Vern. 441; *Strader v. Byrd*, 7 Ohio 330; *Coen v. Funk*, 26 Ind. 289; *Alexander v. Smith*, 4 Sm. & Marsh. 258; *Respass v. McClanahan*, Hard. (Ky.) 342; see *Moss v. Baldock*, 1 Phil. 118; *Burrell v. Burrell*, 10 Mass. 221).

The case of *Stafford v. Bryan*, 2 Paige, 45, which criticises *Barbon v. Stearle*, 1 Vern. 416, is itself criticised in *Longworth v. Sturges*, 4 Ohio St. 715.—REP.

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review, the judgment of the court of errors and appeals in other words, he asks this court, by a proceeding purely supervisory in its character, to determine, upon certain new facts he proposes to put in evidence, whether the judgment of the court of errors and appeals is right or not. That, I think, this court is not authorized to do. But this conclusion does not leave the petitioner remediless, if he has really suffered a grievance which this court is competent to redress. This court will be open to him whenever he can come here with an original bill, exhibiting a state of facts which renders it plain that it will be against conscience and right to let his adversary execute his judgment, and that it was not possible for him, by the exercise of ordinary care and diligence, to have discovered those facts sooner. Equity delights to relieve the victims of fraud, accident and mistake, but they must seek its aid in the methods appointed by law.

The petition must be dismissed, with costs.

MARIA MULOCK

v.

WILLIAM G. MULOCK.

1. A deed of gift will always be set aside in equity, even in a case free from actual fraud, whenever it is clearly shown that the deed does not, in a material respect, conform to the intention of the grantor, or that he executed it under a total misapprehension as to its effect.

2. A son who occupies towards his mother a position of trust and confidence, is bound, if his mother desires to make a deed of gift to him for a large part of her estate, to see that the deed, in all substantial particulars, conforms to her intention, and that she fully understands its nature and effect; otherwise the deed will be set aside.

3. A court of equity never lends its aid, at the instance of the donee, to reform a voluntary deed.

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On final hearing before the vice-chancellor, on bill and answer and proofs taken orally.

Mr. Joseph Coult and Thomas N. McCarter, for complainant.

Mr. John Whitehead, and Mr. David R. Garniss, of New York, for defendant.

THE VICE-CHANCELLOR.

This is a suit by a mother against her son, to avoid three deeds made by the former to the latter. Two of them were executed on the 19th day of October, 1871, and the other April 6th, 1872. Together they transferred real estate, situate in the city of Newark, worth, at the time they were made, nearly \$150,000. They were purely voluntary, being, as the defendant claims, deeds of gift. The property thus conveyed, together with two gifts alleged to have been subsequently made to the son, constituted more than one-half of the mother's whole fortune. At the date of the deeds, she was about seventy-five years old, and the son thirty-one. She had eight other children. The relations between the mother and the son were of the most confidential character. His influence over her was very great. He admits that she reposed great confidence in him, and relied implicitly on whatever he said; that he had full command of all her business; that whenever she wanted to know anything about her affairs, she applied to him. He received all her moneys, and controlled their disbursement, and attended to the preparation and execution of all the papers which it was necessary for her to execute in the management of her business. In the management of her estate, he was, to a very great extent, the mind and will that controlled it, and she, simply the hand by which he wrought his purposes.

On the defendant's own showing, it is obvious his position was one of high trust and confidence, where he was bound, both by honor and law, not only to abstain from

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everything like craft and guile, but to be generously just and fair; to cast behind him even a wish to use his mother's trust in him as a means of personal advantage or selfish profit.

The bill presents a bad case of fraud. It alleges that the complainant was induced to execute the two deeds first in date, under a belief that they were releases. She held a mortgage upon certain lands situate in East Newark, which had been divided into building lots and mapped, and she had been in the habit, whenever a lot was sold, of releasing it from the lien of her mortgage. Five or six such releases had been executed prior to the date of the deeds. She says that when she executed the two deeds now under consideration, she supposed they were releases, releasing the lien of her mortgage from lots which the mortgagor had sold.

The defendant says all the gifts to him were made in execution of a purpose long cherished by his mother, and which originated in a desire expressed by his father that, in the distribution of the property he gave her by his will, a larger share should be allotted to him than to the other children. He also says that the two deeds first executed were prepared after she had repeatedly directed him to have them prepared, and that he read them to her in the presence of a person who, in consequence of his participation in the transaction, and close identification with the defendant in the whole of this business, would undoubtedly have corroborated the defendant's evidence on this point, if he could. But he swears the deeds were not read. He says, that just before the complainant, the defendant and he went together to the office of the notary before whom the deeds were executed, the defendant came into the room where the complainant and he were, and said: "Ma, I have got those deeds from Newark; if you will go and sign them, Mr. Riker can take them and have them recorded. I did not hear any reading of the deeds at all." He also says that they went to the office of the notary; that the notary asked the complainant if she understood what she

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was signing, and they talked some, and then she signed the papers, after which they were put up and handed to him, and he brought them to Newark.

Just here it is important to state that this witness, when speaking of the third deed, which he said he had prepared at the complainant's request, said: "When this last deed was executed, nothing was said about a release; the complainant knew—it could not be otherwise but what she knew—that she was signing a deed, but the others I have got nothing to say about." When we consider the position and relations of this witness, his part in the transaction, and his opportunities of knowledge; that he had the two deeds first in date prepared at the request of the defendant, and took them from Newark to the residence of the complainant in New York, and there delivered them to the defendant, and not to the complainant; that he remained over night in the house of the complainant, and had a conversation with her, alone, next morning, but made no allusion to the munificent act she was about performing towards her son; and, although he was then her agent to collect the rents of the properties he knew she was about to convey, he evinced no curiosity to know from her what were to be his relations in the future, in respect to them, towards her; that, although he knew she had divested herself of all title, but did not know that it was understood that the rents should be reserved to her, he continued, up to the time the deeds were repudiated as fraudulent, to treat her as the owner of the properties, collecting the rents in her name, taking out insurance in her name, and making repairs in her name; that, at almost all the important transactions brought under review in this case, he seems, most fortunately for the defendant, to have been present, but how or why it happened so he cannot very satisfactorily explain; and that when the mother's denunciation of the son's conduct constrained him to leave her house, he took up his abode with this man—his statement, just quoted, amounts to something more than a simple confession of ignorance. I regard

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it as absolutely certain that, if these deeds are the product of fraud, that this person actively and consciously assisted in its perpetration.

The deed of April 6th, 1872, embraced two lots—No. 587 Broad street, and No. 27 Cross street. The complainant admits that, under a representation by Riker that the title to lot 587 Broad street was defective, and would probably be the subject of litigation, and, on his advice, she consented to convey it to the defendant, and directed a deed to be prepared accordingly. She says a deed was afterwards presented to her for execution, and she signed and acknowledged it without its being read to her, under the belief that it simply conveyed the lot she had directed to be inserted. Riker, on the contrary, says that she directed both lots to be included, and both he and the defendant swear that the deed was read. The defendant says it was read to her before they went to the notary's office, and Riker says it was read to her by the notary, at his request, after they got there. The notary has not been examined. Some time after the execution of this deed, he removed from New York City to the state of Missouri. The defendant, though aware of his place of residence, has not deemed it advisable or necessary to make the requisite effort to get his evidence.

If we accept the evidence on the part of the defence as entirely accurate, still it is not at all certain that the complainant executed the deed fully understanding what it embraced. It is not pretended that any explanation was made by which the complainant was told, simply and plainly, that the deed embraced the two lots. All that is claimed is that the whole deed was read. If this work was performed by the notary, it is very probable the reading was so rapid and indistinct as to be in a great measure unintelligible. Any reading to an unprofessional person, or a person not familiar with the terms used in describing lands, unaccompanied by an explanation expressed in simple language, would be quite as likely to mislead or confuse as to

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enlighten. But let me say, in addition, I think there is great reason to doubt the truthfulness of a story which, in effect, says that this old lady quietly submitted to the infliction of having this long paper read to her, the most of which was mere jargon to her, without the slightest expression of impatience or any inquiry as to its necessity or use. What was the reason for this purely ceremonial caution? She had directed the preparation of the deed; she was surrounded by persons in whose integrity she had the utmost confidence; she was not consummating a bargain where her interest and self-protection demanded she should be watchful and cautious; her trusty son was at her side, and the act she was about to perform was the bestowal of a gift upon him; under such circumstances, it seems to me, anything like a mere ceremonial caution, directed entirely by another, would have been promptly resented, not only as a useless infliction, but an impertinent interference.

I am compelled, moreover, to say that neither the demeanor of these witnesses while giving evidence, nor their evidence itself, inspired my confidence. Their evidence bears marks which furnish cause for serious distrust; it is marked by evasion, an unnatural forgetfulness and an affected ignorance and dullness. No one can read the testimony of either without observing that, while their recollection is full and fresh on every point which an unprofessional mind would deem indispensable to the establishment of the fact that the deeds were legally executed, they have no recollection whatever of those minor circumstances and details naturally and almost unavoidably forming a part of such a transaction, and which usually fasten themselves upon the memory more firmly than its more important features. Nor do I think any one can fail to see that the circumstances attending these very important transactions, as they describe them, are unnatural and improbable. Why, the bestowal of these princely gifts excited no more wonder in the mind of Riker, nor gratitude in the heart of the son, than if the mother had passed over to the son a ten-dollar bank



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note. The deeds are produced and executed without a word being uttered by either as to the unusual character of the transaction; nor is it said the mother spoke a single word in justification or explanation of her act, though by it she was bestowing upon one of her children nearly as much she could give the other eight altogether. Nor does appear that she accompanied the gift with the slightest admonition as to prudence, or the least expression of a hope that the son would remain faithful to his filial obligations. Usually, some remark of that nature would be the natural, and almost inevitable, accompaniment of such an act.

But it is insisted that an admission by the complainant, made in August, 1872, has been proved, which conclusively demonstrates that the deeds were her conscious, deliberate and voluntary acts. The admission is proved by two persons, a husband and wife. It is said it was made to the wife first, and immediately afterwards repeated to the husband, in the presence of the wife. The husband says, the complainant said that she had transferred or deeded all her property in Newark to the defendant, and also a brown stone house in the city of New York, but he was not to have full control of it until after her death; the property was to be repaired out of the rents, the defendant was also to have enough of them to pay his personal expenses, and the balance was to be paid over to her as long as she lived. She also said that the property she had thus disposed of did not embrace her whole estate; she had considerable left, and on her death that was to be equally divided among the defendant and her other children. The wife's recollection differs so widely from that of her husband, in almost every material point, that, in the absence of cogent proof to the contrary, it would be very difficult to believe that they were attempting to reproduce the same conversation. She says the complainant told her, when they were alone, that the defendant should have all her property; it had belonged to his father; she had given her daughters all she intended to give them, and the defendant should have the remainder;

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she did not specify the property, but said he was to take all the balance. She further says that her husband came up just at this point in the conversation, and that the complainant repeated to him what she had just before said to her. She heard both the original statement and its repetition.

It is needless to remark that the discrepancy between these two narratives is fundamental and irreconcilable—the one speaks of a purpose fully executed, embracing part only of the complainant's estate, the other of a purpose resolved upon but unexecuted, embracing the whole of her estate. Both witnesses are doubtless honest, but the question is, Which is right? Fortunately, the proper determination of this case does not turn upon the solution of that question.

Even if we look at the deeds brought in judgment solely from the defendant's standpoint, and take his story of their origin and history, as giving the whole truth, still, in my judgment, it is the duty of the court to declare them invalid. They are absolute in terms, giving the defendant not only a full estate in the lands conveyed, but a perfect and absolute right of present enjoyment. In this respect, it is admitted, the deeds do not conform to the intention of the grantor, nor to the understanding of the grantee. The defendant swears that his mother said she would give him the properties, but would keep the rents, and that he said, very well. He also says, she said so at the time the deeds were made, and that that has always been the understanding between them.

The complainant's act, in making the gifts, was an act of pure grace; she was at liberty to impose such conditions as she saw fit, and the defendant was bound, both in law and honor, to see that what she intended to reserve was secured to her as fully and as perfectly as that which she intended to give was granted to him. He was bound to do something more than practice the utmost good faith; his position made it his duty to see that the instruments to be executed by his mother were sufficient, legally, to carry her whole scheme or purpose into effect—not simply a part—

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and, also, that she fully understood their nature, effect and consequences. A failure in any one of these important duties was a fraud.

The legal principles to be applied in testing the validity of these deeds, I think I am bound to consider settled in this court. A deed of gift will always be declared invalid by a court of equity, even in a case unsmirched by fraud, whenever it is clearly proved that the deed does not, in a material respect, conform to the intention of the grantor, or that he executed it under a total misapprehension as to its effect. *Garnsey v. Mundy*, 9 C. E. Gr. 243; *Story's Eq. Jur.* § 706b. According to the judgment of Lord Eldon, in a case so familiar that I need not name it, the question is not, did the grantor execute the deed voluntarily, but, with full knowledge of the nature, effect and consequences which the law gives it. To be upheld, it must be the pure, voluntary and well-understood act of the grantor's mind. Said Vice-Chancellor Stuart, in *Anderson v. Elsworth*, 7 Jur. (N. S.) 1052, 3 Giff. 154: "This court never can recognize any deed which is a mere voluntary deed of gift, when it appears that there was any defect in the understanding of the nature of the gift on the part of the donor; if the deed be tainted with a want of complete understanding of its nature by its author, the court must treat it as invalid, and consider that the property did not pass." The same principle has been stated and applied in *Houghton v. Houghton*, 15 Beav. 278; *Toker v. Toker*, 31 Beav. 644; *Phillipson v. Kerry*, 32 Beav. 628; *Lister v. Hodgson*, L. R. (4 Eq. Cas.) 30; *Coutts v. Acworth*, L. R. (8 Eq. Cas.) 558; *Wallaston v. Tribe*, L. R. (9 Eq. Cas.) 44. The wisdom and justice of this principle are obvious to every mind. Its application to this case is conspicuously pertinent, and its effect most righteous.

The deeds cannot be reformed. A court of equity never lends its assistance to enforce the specific performance of a voluntary contract, where no consideration emanates from the party asking performance. *Fry on Spec. Perf.* 71;

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Groves v. Groves, 3 You. & Jer. 163; *Story's Eq. Jur.* § 787. In *Lister v. Hodgson*, *ubi supra*, Lord Romilly, master of the rolls, said: "What I consider to be settled by the cases is this, that if a voluntary deed is incomplete, this court will not compel the completion of an imperfect instrument; the court will never interfere to enforce a contract for the due execution of a voluntary deed." And in *Turner v. Collins*, L. R. (7 Ch. App.) 342, Lord Hatherly said: "It has always been said, and truly, that there is great difficulty in reforming a voluntary deed, because, if any part of it is shown to be contrary to the intention of the parties, you can only deal with it by setting the whole aside." Like views were expressed in *Phillipson v. Kerry*, *ubi supra*, and *Brown v. Kennedy*, 9 Jur. (N. S.) 1166, 33 Beav. 133.

All three of the deeds must be adjudged invalid as to all the lands described in them. No distinction can be made in favor of the lot No. 587 Broad street. If the defendant's evidence is believed, he, either designedly or negligently, permitted his mother to convey that lot to him by a deed which, by its terms, gave him, as he knew or ought to have known, a great deal more than she intended. And if the evidence on the part of the complainant is believed, it is shown to be so thoroughly infected with fraud, as to one lot, that no part of it can be allowed to stand. Under neither view can any part of that deed be held to be valid. After a very careful and patient examination of this case, I am compelled to say the conviction left upon my mind by the evidence is, that the defendant has been guilty of something worse than a mere legal fraud.

The complainant is entitled to a decree, with costs.

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TOBIAS C. HENDRICKSON and ISAAC H. SHERMAN

v.

THE EXECUTOR OF HUGH WALLACE, deceased, and others.

1. Parties having no common interest, but asserting several and distinct rights, cannot unite as plaintiffs in the same suit.

2. A misjoinder of plaintiffs must be taken advantage of by demurrer; if the defendant answers, the objection will be considered waived.

3. But, even when so waived, if the effect of the misjoinder is such as to embarrass the court, or to prevent it from doing complete justice, the court may, of its own motion, dismiss the complainant.

4. The court will usually dismiss, when it appears that the separate interests of the co-plaintiffs are of such a nature that they are likely, in the future progress of the cause, to come into conflict, and thus transform the suit into a contest between the plaintiffs.

5. Equity will reform deeds for the correction of mistakes, but, to warrant the exercise of this power, the proof of mistake must be clear and satisfactory.

On final hearing on bill and answer, and proofs taken before a master.

Mr. John S. Applegate, for complainants.

Mr. Chilion Robbins, for defendants.

THE VICE-CHANCELLOR.

This is a suit for the reformation of two deeds. The case of the complainants may be summarized as follows: Hugh Wallace died in March, 1871, leaving a will, by which he gave his executor power to sell, either at public or private sale, all his real estate except a lot devised to one of his children. At the time of his death, the testator was seized of a tract of land situate in the town of Red Bank, Monmouth county, with a frontage on Mechanic street of two hundred feet, and extending back one hundred and fifty feet. Some years before his death, the testator had divided

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this tract into building lots, of forty feet each, and had a map made of it. Afterwards, he laid out a street upon the map, so as to cover nearly the whole of one of the lots, though it was never used as a street, nor opened for use. In April, 1872, the executor named in the will, made a verbal contract with the complainant Hendrickson, to sell to him the western half of this tract for \$1,500, and, on the 12th of the same month, executed a deed to him in fulfillment, as it was supposed, of the contract. In July, 1872, the executor sold the residue of the tract to the complainant Sherman, for the same price for which he had sold the other; and, on the 3d of December, 1872, he executed a deed to Sherman, conveying to him, as it was supposed, what he was entitled to under his contract. The preparation of the deeds was entrusted entirely to the executor, and, when they were delivered, they were accepted by the grantees without examination, and sent at once to the clerk's office for record. The grantees seem to have reposed the utmost confidence in the executor's honesty and carefulness, and to have acted as though anything coming from him might be safely accepted without scrutiny. It was subsequently discovered that the deeds did not convey all the lands the grantees had purchased. Instead of giving each a frontage on Mechanic street of one hundred feet, as they were entitled to according to the terms of their contracts, Hendrickson's deed conveys eighty feet of the western part, and Sherman's deed eighty feet of the eastern part, leaving a strip forty feet in width lying between them. The object of the present suit is to have these deeds so reformed as to embrace the whole tract purchased by each.

The suit is undefended by the vendor. The beneficiaries under the will of the testator have been made parties, and three of them have answered, denying that the contracts of purchase embraced the land in controversy.

The summary of the complainants' case, as just given, shows, very plainly, a misjoinder of parties. Parties having no common interest, but asserting several and distinct

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rights, cannot unite and seek redress in a joint suit, though their several rights of action may be against the same person. *Story's Eq. Pl.* § 279. The complainants purchased distinct parcels of land, by separate contracts, made at different times, and neither, therefore, has the slightest interest in, or connection with, the contract of the other. They have no community of interest whatever. The only respect in which it can be said that they have the same interest is, that their positions are similar. They each happen to have a right of action against the same person, for causes almost identical in their facts. This, however, is not sufficient to give them a joint right of action.

Misjoinder of plaintiffs is an objection never treated with favor at the final hearing. As a general rule, a defendant must avail himself of it by demurrer, or lose it forever. If he attempts to answer the complainant's case, by answering on the merits, the objection will be considered waived, so far as he is concerned, and the court will proceed to make a decree regardless of it, if it can do justice to all parties. But, if the effect of the misjoinder is such as to embarrass the court and prevent it from giving appropriate relief and doing justice to all the parties, it may, of its own motion, dismiss the bill. *Veghte v. Raritan Water Power Co.*, 4 C. E. Gr. 144; *Green v. Richards*, 8 C. E. Gr. 32; *Annin v. Annin*, 9 C. E. Gr. 188; *Lyman v. Place*, 11 C. E. Gr. 31; *Lambert v. Hutchinson*, 1 Beav. 286; *Story's Eq. Pl.* §§ 237, 283.

The court will dismiss, on its own motion, usually when it appears that the separate interests of the co-plaintiffs are of such a nature that they are likely, in the future progress of the cause, to come into conflict, and thus transform the suit into a fight between the plaintiffs. *Jacobs v. Lucas*, 1 Beav. 436; *Griffith v. Vanheythuysan*, 15 Jur. 421.

There is no reason to apprehend that any such difficulty can arise in this case, nor that any other can arise which will embarrass the court, or prevent it from doing complete justice to all parties. The infirmity of the suit in this

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respect, I think, must be considered cured by the waiver of the defendants.

The power of courts of equity to reform deeds for the correction of mistakes need not be vouched for, at this day, by the citation of precedents. It stands among their most ancient and useful functions. To warrant its exercise, however, the proof in demonstration of mistake must be clear and satisfactory, such as produces a strong conviction of its truth. The courts will not change what is written, upon loose, doubtful or equivocal evidence.

The proof of mistake here is as strong as human testimony can make it. Both parties to the Hendrickson contract swear, that it was distinctly agreed that Hendrickson's purchase comprehended the western half of the tract fronting on Mechanic street and lying between the lot of Alice Ludlow on the west, and the lot of Edward M. Throckmorton on the east. With equal positiveness, both parties to the Sherman contract swear, that it was distinctly understood that Sherman's purchase embraced the residue of this tract. The vendor says that he intended that the deed he made to each should convey the land purchased by each, and that the mistake in the descriptions inserted in the deeds resulted from a misunderstanding between his scrivener and himself. He also admits that, when his attention was called to the fact that there was a strip of land lying between the two tracts, not embraced in either deed, that he said there was a mistake, that he had sold half of the whole tract to each, and had intended to convey half to each, and that he would try to have the mistake rectified. If this evidence is believed, all ground for controversy is removed, and the court should make the deeds express what the parties intended they should declare.

The case made by defendants exhibits nothing which raises a doubt as to the truthfulness and entire accuracy of this evidence. So much of their evidence as attributes to the executor expressions tending to show that, in his conferences with the beneficiaries under the will, he represented

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that he was negotiating contracts with the complainants materially different, as to the quantity of land to be conveyed, from those now proved to have been made, can have no force against the complainants. As to them, such evidence is clearly inadmissible.

Nor do I find any evidence in the case which, when read fairly, shows that they have done or said anything at all inconsistent with the claim they now assert. It is true, they offered to buy the land in controversy after they knew of the mistake, but their offer was not made until they had first asked for a rectification and been refused. Their offer was made when they were in a position where they were required either to give up the land or buy it again, or to attempt to vindicate their rights by having recourse to the courts. To say that an offer to purchase, made under such circumstances, was an abandonment of their right, or a confession that they had no right, would be a perversion of the facts. The complainants' case is proved so fully and conclusively that I am thoroughly convinced they are entitled to a decree.

Where a deed conveys only part of the land agreed to be conveyed, and the vendee does not intend to relinquish any part of his purchase, but accepts, in consequence of the mistake of the vendor, a conveyance of less land than he is entitled to under his contract, he is not precluded by his acceptance from maintaining an action to recover the residue. *Conover v. Wardell*, 5 C. E. Gr. 271; *Rowley v. Flannelly*, 3 Stew. 614. Reformation, and not specific performance, is the proper relief to be given in such a case. *Conover v. Wardell*, 7 C. E. Gr. 497.

A decree reforming both deeds, so that each shall convey one hundred feet on Mechanic street, and also in the rear will be advised.

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FRANCES R. JONES

v.

WILLIAM H. KNAUSS and WILLIAM H. FAIRCHILD.

1. A trustee who, intentionally, without mistake or accident, destroys the written evidence of his trust, places himself in a position where the court is bound to make all reasonable presumptions against him.

2. All things may be presumed against a wrong-doer.

3. If a party to a suit is proved to have destroyed a written instrument, a presumption arises that, if the truth had appeared, it would have shown that the paper contained something prejudicial to his interest, and, in such a case, slight evidence of the contents of the paper will usually be sufficient.

4. Evidence of oral admissions and declarations belongs to a class of proofs which should be received with great caution.

5. A material and controlling fact which is clearly and fully averred in the bill, and not denied or alluded to in the answer, must be taken as confessed.

On final hearing on bill and answer, and proofs taken orally before the vice-chancellor.

Mr. Frederick H. Pilch, for complainant.

Mr. John A. Cobb, for defendants.

THE VICE-CHANCELLOR.

The principal object of this suit is to enforce an express trust. The subject of the trust is a mortgage. The complainant and her husband, on the 31st of March, 1874, conveyed a house and lot, belonging to the husband, to one Klan Duyn, for \$7,000. In part payment of the purchase-money, Mr. Duyn gave a mortgage to the defendant Knauss, for \$8,000, payable three years after date, and bearing interest from date. The mortgage was made to the defendant, as trustee of the complainant and her husband. A writing, stating the terms of the trust, was executed in

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triplicate by the complainant and her husband and the defendant, on the day the mortgage was executed, and one copy delivered to each of the parties. These have since been destroyed by the defendant.

The important question of the case is, What were the terms of the trust? By his answer, the defendant denied that he was, or ever had been, trustee for the complainant; but, in his evidence, he admitted that a declaration of trust had been executed in triplicate, as stated by the complainant, and, also, that it contained a trust in her favor. The complainant says that the trust agreement first required her to assume and pay a debt of \$500 which her husband owed to her sister; that it then required the defendant to pay to her husband all interest which accrued on the principal of the mortgage up to the time it fell due, and that the principal, on the maturity of the mortgage, should be paid to her; while the defendant says that the agreement provided that the interest, until the maturity of the mortgage, should be paid to the husband, and that, when the principal fell due, \$1,000 of it should be paid to the complainant, and the balance to her husband. The dispute is as to the amount of the principal the complainant is entitled to, according to the terms of the trust.

All three copies of the declaration of trust were destroyed by the defendant Knauss. That is undisputed. Unless he has justified his conduct, in this respect, by a satisfactory explanation, his act must be regarded as a wrongful attempt to defeat the complainant's right by destroying the evidence whereon it rested. A trustee who, voluntarily, without mistake or accident, destroys the written evidence of his duty and liability, commits the most flagrant betrayal of trust that it is possible for him to perpetrate. This is the defendant's justification: He says the complainant paid \$500 on account of the \$1,000, shortly after the mortgage were executed, and that she endorsed a receipt for that on her copy of the declaration of trust; that an additional \$500 was paid to her, in his office, by her husband, in

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1874, when she gave up her copy of the declaration of trust for cancellation, and all three were then destroyed by him, with the consent of all parties. He further says, the reason all three were destroyed was, because the trust had been executed.

The complainant disputes the truth of all the material parts of this statement. She admits the payment of the sum of \$500, but says that is all she has ever received. She denies, with great positiveness, that she surrendered her copy of the declaration of trust for cancellation, or that she consented to its destruction, or that she had the slightest suspicion, when she let the defendant have it, that he intended to destroy it. She further says that the defendant obtained it of her in June, 1874, under a representation that he wanted to copy it; and that, although she afterwards applied to him several times for it, he kept it, under various pretences, until, at last, he told her that he had given it to her husband, or destroyed it.

The evidence shows quite conclusively that the complainant repeatedly demanded the surrender of this paper. She swears positively to several such demands, and gives the circumstances attending them, in detail. The defendant admits that, on one occasion, the complainant notified him that if he did not get her papers for her, she would take legal proceedings against him. His clerk, in answer to a question requiring him to state whether the complainant had not asked for the surrender of her copy of the declaration of trust, said, that the complainant came to the defendant's office, on one occasion, in the defendant's absence, and made a "terrible time," but he did not know what it was about. He says, "She talked as if the defendant was trying to keep out of her way." It is impossible to adopt any view of the evidence on this point which does not leave the fact that the complainant repeatedly asked for the return of her copy of the declaration of trust, practically undisputed; and yet, it is not pretended that the defendant met any of these demands by what would have been an almost irrepres-

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sible answer, had it been true that she had been paid in full and had surrendered her paper for cancellation, and it had been destroyed, as he says it was, by him, in her presence. Under the facts, as he states them, her claim was most audacious, and, unless he was insensible to the most common emotions of our nature, he could scarcely have avoided meeting some one of the repetitions of her demand by a statement of the truth so blunt and indignant that she would not have ventured upon another repetition. The natural expression of his astonishment and indignation would have been, "Why, what do you mean? You know you have been paid—that you gave up your paper, and that I destroyed it in your presence; now, why do you come here and ask me for it?" So far as the evidence shows, nothing of the kind was ever said; nor is it even claimed that the defendant ever met any of the complainant's demands by an assertion that she had been paid, or that she had surrendered her paper for cancellation.

But, suppose we take it to be true that the complainant has been paid, was there anything in that fact that made the destruction of the papers necessary or proper, or which would have been likely to induce the complainant's husband to consent to their destruction? He had not been paid; on the contrary, his interest in the mortgage had been increased. Instead of being entitled to \$2,000 of the principal, as he was under the original division of interests, he is now entitled to the whole. Is it likely that he would have consented, under this state of affairs, that all written evidence of his right should be destroyed, in the absence of the least necessity for its destruction? Is it not much more reasonable to believe that, if he had anticipated the payment of the sum his wife was entitled to, by nearly three years, that the arrangement which would have naturally suggested itself to the minds of the parties, would have been an assignment of her interest to him? or, if the destruction of the papers had been suggested as a proper step under the circumstances, would not the husband's self-

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interest have prompted him to ask for an assignment of the bond and mortgage? He was now entitled to both principal and interest, and why should he not have the papers? Or, if the defendant wanted to retain the bond and mortgage, and it had been thought advisable to destroy the evidence of the trust, so far as it had been executed, would not the good sense of all the parties have said at once, if an honest arrangement was all that had been desired, that it was only necessary to destroy the complainant's copy? That course would certainly have better harmonized with the transaction, as the defendant describes it. It would have taken from the complainant the written evidence of her right, but left her husband in possession of his. Perhaps the destruction of the evidence of the trust, so far as the trust had been performed, might, under some circumstances, be excused on the ground of stupidity, but that is the extreme limit to which such an excuse can be carried. After that, destruction meant fraud.

The bond and mortgage were never assigned or passed over to the husband. He died in October, 1875, and although the defendant says, by a payment made in June, 1874, the husband became entitled to the whole sum secured by the mortgage, and he considered his duty as trustee so fully performed that it was proper to destroy the written evidence of the trust, yet it appears he continued to hold the trust property and made no effort to pass it over to the person entitled to it. Not only so, but, after the death of the person entitled to it, he administered upon his estate, withheld the mortgage from his inventory, and afterwards assigned it to his brother-in-law in payment for sixteen hundred acres of land situate in the state of Missouri.

Two other facts must be mentioned in this connection. The defendant, on the 1st of August, 1874, signed a waiver of priority of his mortgage over one subsequently given, in which he described himself as "trustee of Abraham Jones and wife." This description of himself was utterly inconsistent with the facts then existing, as he now states them,

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but perfectly consistent with those the complainant says then existed. If the complainant had been fully paid in the June previous, and all trust relations had then ceased to exist, and the evidence of the trust had been destroyed, it is quite improbable that the defendant would have suffered himself to be described in a paper of this character as her trustee.

Again, a difficulty arose between the complainant and her husband, in the latter part of July or early in August, 1874, which resulted in a suit for divorce against the complainant, on a charge of adultery. On the 12th of August, 1874, the husband served a written notice on the defendant, forbidding him to deliver to the complainant any papers in his possession. It is not pretended that the defendant ever had in his possession any paper belonging to the complainant, of which she sought the possession, except her copy of the declaration of trust. The notice would, therefore, appear to have been objectless, unless it was intended to impound this paper. The complainant was, as the evidence shows, endeavoring at this time to compel the defendant to surrender it. The trust, so far as it benefited her, had been created to induce her to join her husband in the deed made for the mortgaged premises. In view of the suit for divorce, it was quite natural, if the husband knew the complainant's copy of the declaration of trust was in the defendant's possession, that he should have attempted to keep it there; but if he knew it had been destroyed, it is impossible to assign a rational purpose to his notice.

The prominent circumstances of the case—those which may be safely relied on to guide the way to the truth—so strongly corroborate the truth of the complainant's evidence as to leave no doubt in my mind that the declaration of trust were destroyed without her consent or knowledge. They show, too, I think, quite clearly, that they were destroyed for an improper purpose; at least, their destruction was not necessary to the accomplishment of any honest or useful purpose. The reason the defendant assigns for

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his act, is utterly insufficient and improbable; just as incredible as it would be for him to attempt to justify or excuse the destruction of the mortgage, by saying he thought it was proper to destroy it, because part of the mortgage debt had been paid.

The defendant's act, in view of the facts, can receive but one interpretation. On his own showing, it was admittedly wrongful against the complainant's husband, and presumably so against the complainant. His position is one where he is liable to the most unfavorable presumptions. He has unquestionably betrayed his trust, and the court is bound to apply to him the maxim *in odium spoliatoris omnia præsumuntur*. If a person is proved to have destroyed a written instrument, a presumption arises that, if the truth had appeared, it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance, and, accordingly, slight evidence of the contents of the instrument will usually, in such a case, be sufficient. *Broom's Max. 940*. Independent, however, of the legal presumption, the case is decidedly with the complainant on the question, What were the contents of these papers? Four witnesses swear that the contents of the complainant's copy were substantially what she says they were. One of them read it twice; another read it once and also heard it read; another read it at the complainant's request, just after it was delivered to her, and when she was greatly delighted with her good fortune in getting it, and the fourth heard it read by the person who swears he read it twice. Three of them were related to the complainant, and, therefore, had such an interest in the paper as would have been likely to induce them to read it attentively and discuss its contents. The other read it under circumstances that could scarcely have failed to impress its contents upon her memory. She says the complainant came to her very much pleased with the paper, and wanted her to read it. She did not desire to do so, and became slightly piqued because the complainant insisted upon taking her time; but she finally read it,

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These four witnesses all say that the agreement contained a stipulation that the complainant should pay a debt of \$500, which her husband owed to her sister. It is not disputed that the complainant paid this debt. As already stated, the defendant says that the agreement provided for the payment of \$1,000 to the complainant. In this, he is corroborated by his clerk, who swears that he wrote all three copies of the agreement. But neither remembers the stipulation on the part of the complainant, at least neither mentions it in repeating the contents of the agreement. The fact that the complainant made the payment is, in my judgment, a strong corroboration of the accuracy of her recollection and that of her witnesses; while the fact that neither the defendant nor his witness mentions this stipulation in attempting to repeat the contents of the agreement, must be regarded as very cogent evidence that their recollection has become so obscured as to be untrustworthy.

The defendant has also attempted to show that his recital of the contents of the agreement is correct, by proof of admissions alleged to have been made by the complainant. Evidence of this kind must always be received with great caution, and should invariably be subjected to the most rigid scrutiny. Even when it proceeds from the mouth of an honest and disinterested witness, it is liable to much imperfection and error. Sometimes a word misunderstood, or a look or action misrepresented, will produce upon the mind of the hearer an impression so entirely different from that which the speaker intended to convey, that if the statement or admission subsequently becomes the subject of investigation, each party, in consequence of the misunderstanding, will be forced to distrust the integrity of the other. The hearer will believe that the speaker intends, willfully, to deny what he knows he said, and the speaker will believe that the hearer corruptly intends to put words in his mouth that he knows he never uttered. The admissions imputed to the complainant are, first, that she said her interest in the mortgage was \$1,000; and, secondly, that

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about the 1st of August, 1874, she said that she had been paid in full. These admissions, it will be observed, stand in sharp and decided conflict with what have already been declared the undeniable facts of the case. So true is this, that I find it impossible not to regard the evidence in support of the admissions as the result of mistake or misapprehension. If we believe the complainant made the last one imputed to her, we must also believe that she made it at the very time she was struggling to wrest her copy of the declaration of trust from the hands of the defendant. We must also believe that she admitted what the defendant never asserted or insinuated when he was under the almost constant pester of her demands for the return of her paper, namely, that she had been paid. Moreover, I may say, I am fully satisfied that if the agreement had provided that the complainant should only be paid \$1,000, and she had been paid, and had given up her copy of the agreement, the papers never would have been destroyed. The destruction of the papers, under the circumstances stated, was so unnatural, unreasonable and improbable, that that act cannot be ascribed to an honest purpose, upon any evidence to be found in this case.

My conclusion is, that the complainant, by the terms of the trust, is entitled to the whole principal of the mortgage, less what she admits she has been paid.

As already stated, it appears that the mortgage in controversy was assigned by the defendant to his brother-in-law, in payment for lands in Missouri. The assignment was made just before this suit was instituted. The defendant says that he holds these lands subject to the same trusts upon which he held the mortgage. His deed has not been put in evidence. Whether the trusts are expressed upon its face or not, does not appear. Of course, if they were, the assignee, being the grantor of the lands, was chargeable with notice of the terms of the trust. However, that is unimportant. If the assignment was not a mere subterfuge (and I think there is strong reason to believe that that was

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its true character), still the assignee is in no better position, legally, than if that had been adjudged to be its real nature. The bill distinctly charges that he took the mortgage with full notice of the trust. To this he has made no response whatever. He has even omitted to say whether or not an assignment was made to him, or whether or not he claims any right to, or interest in, the mortgage. He has not offered himself as a witness. That he is not an innocent purchaser, must be considered as admitted. A material and controlling fact, which is clearly and fully averred in the bill, and not denied or alluded to in the answer, must be taken as confessed. *Sanborn v. Adair*, 2 Stew. 338; *Lee v. Stiger*, 3 Stew. 611. Besides, there was enough on the face of the papers to put an honest and cautious purchaser on his guard. The bond and mortgage, as they now appear, purport to have been made to "William H. Knauss, in trust for Abraham Jones." Immediately following the words "Abraham Jones," four words have been scratched out, so as to remove all traces of the ink, but the scratching has so greatly reduced the thickness or body of the paper that, by holding either the bond or the mortgage against a strong light, there is no difficulty in discerning the length of each of the words effaced, and the character of some of the letters of which they were composed. I have no doubt the words effaced were "and Frances, his wife," and that the papers were originally made to "William H. Knauss, in trust for Abraham Jones and Frances, his wife."

The complainant is entitled to a decree against both defendants, with costs. But \$1,000 principal remains due on the mortgage. The defendant Fairchild will be decreed to assign the mortgage to the complainant. The defendant Knauss has collected \$2,000 of the principal—\$1,000 before this suit was brought, and the other since, and after he had been enjoined. He will be decreed to pay the complainant \$1,500, with interest from the time the principal fell due.

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NEHEMIAH O. PILLSBURY, assignee of John C. Doremus,
v.
JAMES KINGON.

1. An assignee under a voluntary assignment made by a debtor for the benefit of his creditors, cannot maintain an action to impeach transfers made by his assignor in fraud of creditors.

2. But where the transfer is a fraud upon the assignor, so that he might attack it, his assignee may avoid it.

On demurrer.

Mr. F. Adams, for complainant.

Mr. J. H. Ackerman, for demurrant.

THE VICE-CHANCELLOR.

The demurrer in this case disputes the right or capacity of the complainant to maintain this suit. He is an assignee under the act regulating assignments by debtors for the benefit of their creditors, and, as such, seeks to invalidate a deed made by his assignor, just prior to the assignment, on the ground that the deed was made for the purpose of defrauding creditors. The bill exhibits a strong case of actual fraud, and, if the complainant has a right to avoid the acts of his assignor, there can be no doubt about his right to relief on the case made by the bill. The demurrer presents other objections to the complainant's right to recover than his incompetency to sue, but, in my judgment, they do not possess even the merit of plausibility.

The important question is, Whom does the assignee under a voluntary assignment represent—simply the assignor? or, does he also stand in the right of his creditors, and represent both? If he represents only the assignor, it is clear he cannot be heard to impeach his assignor's acts, for no man can invest another with a power he does not himself pos-

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ness (the creature can never be greater than his creator), and no man can be permitted to found a claim on his own iniquity; *nemo ex proprio dolo consequitur actionem*. A fraudulent conveyance is good against the parties and their representatives. A fraudulent vendee may even recover the subject of the transfer from the administrator or executor of the fraudulent vendor. *Hawes v. Leader*, Cro. Jac. 270; *Osborne v. Moss*, 7 Johns. 163, 1 Am. Lead. Cas. 43. The power to make an assignment for the benefit of creditors is not derived from any statutory enactment. Every debtor, whether solvent or insolvent, possesses, independent of statutory grant, the right to make any disposition of his property which does not interfere with the rights of others; in other words, to make any honest disposition of his property that he pleases. The right of assignment is clearly within the absolute dominion which the law empowers every man to exercise over his own. Our statute does not confer the right, but was made to regulate its exercise. The debtor in this case, in making an assignment, simply exercised a common law right; but he was bound to exercise it subject to the restrictions and limitations imposed by the statute for the accomplishment of certain wise and just purposes. But it was his voluntary act, and not the act of the law. It was an act to which he could not legally be coerced.

Undoubtedly, where a person holding a representative position, comes to title, not under the debtor, but by right paramount to any he possesses, so that his investiture is the act of the law, as is the case with an assignee in bankruptcy, or under the insolvent law, and receivers of a certain class, he is something entirely different from an instrument or appointee created simply by the voluntary act of a debtor. He is the creation of the law for the protection of creditors, and may, therefore, very properly exercise their powers and attributes. 1 Am. Lead. Cas. 42; *Miller v. Mackenzie*, 3 Stew. 291.

This question has been the subject of considerable diversity of opinion. Justice Potts, in *Garretson v. Brown*, 2

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Dutch. 438, stated, that an assignee under a voluntary assignment, not only had the power to avoid a fraudulent disposition previously made by his assignor, but, if he neglected his duty in this respect, creditors could compel him to perform it. This remark was not pertinent to any issue brought under judgment in that case, and was probably uttered without much examination of the authorities, possibly without any.

Chancellor Zabriskie, in *Van Keuren v. McLaughlin*, 6 C. E. Gr. 163, gave expression to the opposite view. He held that a conveyance of real estate, made in fraud of creditors, prior to the date of the assignment, though void against them, is valid against the assignee. He rests his judgment distinctly upon the ground that, inasmuch as the assignor cannot found a claim upon his own fraud, he is powerless to confer authority upon any one else to do so.

Chancellor Kent, in *Bayard v. Hoffman*, 4 Johns. Ch. 450, held that an assignee had a right to impeach fraudulent transfers made by his assignor, but, contrary to his usual habit, he did not attempt to attest the correctness of his conclusion by either citing precedents or giving reasons. When the same question was subsequently presented to Chancellor Walworth for solution, he said: "It is a general rule of law that a person cannot, by any voluntary act of his own, transfer to another a right which he does not himself possess. And where an insolvent debtor has made a fraudulent transfer of his property for the purpose of defrauding his creditors, so that he cannot reclaim it himself, I think he cannot, by an assignment which is wholly voluntary on his part, transfer that right to his assignee for the benefit of preferred creditors, or for the benefit of all his creditors equally." *Brownell v. Curtis*, 10 Paige 210. This ruling was followed in *Storm v. Davenport*, 1 Sandf. Ch. 135. By a statute passed in 1858, the New York legislature expressly invested assignees with this power. *Burr. on Assignments* 545.

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The course of judicial opinion in Pennsylvania has been quite as diversified. *Thompson v. Dougherty*, 12 Serg. & R. 448, held that the assignee simply stood in the shoes of his assignor, and was incompetent to undo what his assignor had done, while, in the subsequent cases of *Englebert v. Blanjet*, 2 Whart. 240, and *Irwin v. Keen*, 3 Whart. 347, the opposite doctrine was laid down, with evident surprise that any other view had ever been expressed from the bench. And then followed *Vandyke v. Christ*, 7 Watts & Serg. 374, in which Chief-Justice Gibson—apparently unmindful of the fact that he had drawn up the opinion of the court in the two previous cases—said: “The assignee is the debtor’s instrument for distribution, and stands in relation to the property as stood the debtor himself. It has been transferred to him as it would have been transferred to the debtor’s right hand, had it pleased him to exercise his common law right. As he stands in no privity to the creditors, he cannot arrogate to himself any of their attributes and rights.”

If a debtor of this state, in making an assignment, simply exercises his common law right, and our statute confers upon his assignee no power or rights in addition to those he derives from his assignor, it would seem to be quite plain, both as a matter of reason and principle, that the assignee, being the mere creature of the assignor, can do nothing more than his creator could do. The statute makes no express grant of creditors’ rights or powers to him, nor do I think it is possible to read the statute so as to be able to say that such grant exists by necessary implication. By the thirteenth section, it is declared that every assignee shall have as full power and authority to dispose of all estate assigned, as the debtor had at the time of the assignment, and to sue for and recover, in his own name, everything belonging or appertaining to the estate of the debtor, and to do whatsoever the debtor might have lawfully done in the premises (*Rev. p. 39*). The assignee’s power of disposition, it will be observed, is limited to that which might

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have been exercised by the debtor himself; his right of action is restricted to the recovery of the "debtor's estate," such, obviously, as the debtor might himself, but for the assignment, have recovered by suit; and when, as the conclusion of the whole matter, general powers are conferred, they are limited to such as the debtor himself might have *lawfully* exercised.

That part of the statute which defines the rights of creditors who exhibit their claims, and also of those who do not, and likewise prescribes how far the debtor shall be discharged, affords, I think, an important clue to the legislative design. It is enacted that creditors who exhibit their demands for a dividend, shall be wholly barred from having afterwards any action against the debtor, unless, on the trial, they shall prove fraud in the debtor in making the assignment, or in concealing his estate, whether in possession, held in trust, or otherwise, but creditors who do not exhibit their claims shall not be barred of their right against either the person of the debtor, or *any of his estate not assigned* (*Rev. p. 40*). Now, it seems to me, if it had been the legislative purpose to invest the assignee with capacity to invalidate the debtor's fraudulent acts, it would not have been thought necessary to reserve the same right to creditors who had exhibited their claims. Indeed, the existence of such right in their hands would be inconsistent with the main purpose of the statute. The main design of the statute is to secure equality in distribution. If the assignee has this right, he holds it for the benefit of all creditors, or, at least, for all who have exhibited their demands. If we say the statute also gives the same right to any creditor who may choose to exercise it, and that each may exercise it for his own exclusive advantage, we engraft upon the statute, in the absence of any expression to warrant it, a meaning plainly in conflict with its fundamental purpose.

But, again, it will be observed, that creditors who do not exhibit their claims, retain their rights against not only the person of the debtor, but against "any of his estate not

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assigned.” What estate is here referred to? Certainly not property acquired subsequent to the assignment. If that had been meant, terms much more apt, as words of description, would have readily suggested themselves to the minds of the legislators. Besides, in preserving the rights of creditors against the debtor’s person, his subsequently-acquired property was made amenable to the payment of such debts. The estate or property intended to be described, was such, I think, as the debtor could not claim or recover, but such as his creditors might.

But a more decisive consideration must be mentioned. If we adopt the complainant’s construction, we are compelled to declare that this statute abrogates an established doctrine of the law, so far, at least, as it applies to a special class of cases. It is a settled legal rule, that a transfer of property, made in fraud of creditors, while void as to them, is good between the parties and their representatives. A solvent debtor may make an assignment. If a surplus remains after the assignor’s debts are paid, and the fees and costs of administration are discharged, the assignor is entitled to it. That the surplus shall be paid to him is usually one of the trusts expressed in the deed. If an assignee has the power claimed for him, did the legislature mean that he should exercise it for the benefit of his assignor? Such a purpose must not be attributed to them except upon very clear evidence. If they did not mean this, how is the assignee’s power to be exercised for the benefit of creditors alone, and so that the debtor derives no advantage from it? This case presents a striking example of the difficulties that may result from the adoption of the complainant’s construction. It is estimated that \$2,700 will be realized from the estate assigned; the debts exhibited to the assignee amount to \$4,400; the value of the lands alleged to have been fraudulently conveyed is estimated at \$7,000. So that, if the complainant should be successful in his suit, and should realize the full value of the property, he will have in hand a surplus of over \$5,000.

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What would he do with it? By the terms of his trust he is bound to pay it to his assignor, and yet, as between his assignor and his assignor's grantee, his assignor is precluded, by his own turpitude, from asserting any claim to it. These considerations, as well as the precedents cited, render it quite clear, I think, that the complainant cannot, either in virtue of his office, or by force of his title, maintain this suit.

On the argument, *Matlack v. James*, 2 Beas. 126, was cited as tending somewhat to support the complainant's view. The material facts of that case were: two of four partners, just prior to an assignment by the firm, conveyed their interest in certain real estate, standing in the names of the individual members of the firm (but which had been purchased with the funds of the firm, and been used for partnership purposes, and constituted part of its capital), in payment of their individual debts. The grantee took with notice that the land constituted part of the partnership property. Chancellor Green, on a bill by the assignee, adjudged the deed to be void. He does not state the grounds of his judgment, but I think they are apparent. Real estate purchased with partnership funds, and used for partnership purposes, though title be taken in the names of the individual copartners, is, in equity, considered partnership assets, so far, at least, as may be necessary to pay the partnership debts and adjust the equities between the partners. *Baldwin v. Johnson*, Sax. 441; *Dyer v. Clark*, 5 Metc. 562; *Story on Partn.* § 93. The deed was therefore a fraud on the partnership. It was an attempt, by two of the partners, to divert partnership assets from partnership uses and purposes, and appropriate it to their own use. Upon these facts, it was clearly competent for the assignee, as the representative of the defrauded partners, and in virtue of rights he derived from them, to attack this deed. If no creditor's interest had been involved, he could still have maintained his action. The defrauded copartners had a right to redress against the fraud, and so had their repre-

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sentative. The adjudication in the case referred to, stand on a principle entirely aside from that involved in this discussion, and that case cannot be used as a precedent in this.

The demurrer must be sustained, and the complainant's bill dismissed, with costs.

FRANK H. CASS

v.

NETTIE CASS.

A bill which merely alleges that a wife deserted her husband on a certain date, and afterwards persistently remained absent from residence, does not disclose any cause of divorce known to the law of this state.

On bill and proofs taken *ex parte*.

Mr. T. W. Walker, for complainant.

THE VICE-CHANCELLOR.

This is a suit for divorce *a vinculo*, by a husband against his wife. The complainant has proceeded by bill. His bill alleges that the defendant deserted him July 1st, 1871, since which date she has persistently remained absent from his residence, and hath and doth desert her child.

The cause of divorce here specified, is unknown to the laws of this state. Simply living separate, is not a ground for divorce. Mere absence is not desertion. *Rogers v. Rogers*, 3 C. E. Gr. 445; *Test v. Test*, 4 C. E. Gr. 342. To constitute desertion by a wife, she must forsake her husband in violation of her duty to him, and against his will, and willfully and obstinately continue in a state of separation from him for a continuous period of three years. But

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the absence here charged, is merely from the husband's residence, and not from him. The parties may have constantly cohabited. Desertion is charged as happening on a certain date, but then the charge dwindles to a mere accusation of absence from the husband's residence. This is not enough. Absence is not the equivalent of desertion, and desertion itself is no ground of divorce, but may become so by willful and obstinate continuance for the statutory period.

No ground of divorce is alleged in the bill, and it must, therefore, be dismissed.

THE AMERICAN UNION TELEGRAPH COMPANY

v.

THE TOWN OF HARRISON.

1. Under the eighth section of the general telegraph law, the authorities of an incorporated town have a right to designate the street route on which a telegraph line shall pass through the town, but they have no right to refuse to allow the line to pass at all.

2. Where the poles of a telegraph line, in an incorporated town, are erected outside of the streets, and on private property, and the wires hung thereon, where they overhang the streets, are placed at an elevation sufficiently high not to impede, obstruct or endanger the full, free and safe use of the streets, the town authorities have no right to destroy them.

3. Under the last clause of the eighth section of the general telegraph law, the authorities of an incorporated town are authorized to prescribe regulations fixing the elevation at which telegraph wires shall cross the streets of the town, but until regulations on this subject are

NOTE.—For other instances of overhanging obstructions, see *Grove v. Fort Wayne*, 45 Ind. 429; *French v. Brunswick*, 21 Me. 29; *Jones v. Boston*, 104 Mass. 75; *Day v. Milford*, 5 Allen 98; *Salisbury v. Herchenroder*, 103 Mass. 458; *Jones v. New Haven*, 34 Conn. 1; *Hewison v. New Haven*, Id. 136; *Norristown v. Moyer*, 67 Pa. St. 355; *Hume v. New York*, 46 N. Y. 639; *Taylor v. Peckham*, 8 R. I. 349.—REP.

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adopted, the authorities are not at liberty to treat such use of the streets, for that purpose, as in no way impedes or endangers their full, free and safe use, as a nuisance.

On an order to show cause why an injunction should not issue, heard on bill and affidavits on the part of the complainants, and on affidavits on behalf of the defendants.

Mr. B. A. Vail and *Mr. John P. Jackson*, for complainants.

Mr. E. L. Price and *Mr. J. D. Bedle*, for the defendants

THE VICE-CHANCELLOR.

This is an injunction bill. The complainants are engaged in the construction of an electric telegraph between the cities of New York and Philadelphia. On the morning of the day on which their bill in this case was filed, their line between New York and Newark was completed and telegraphic communication established. For part of the distance between these points their line passes over territory under the jurisdiction of the defendants. The poles erected within this territory are erected outside of the streets or highways, and upon private property, but the wires hung thereon overhang some twenty streets, at an elevation of about twenty-five feet above the roadway. These poles were erected with the permission of the owners of the soil, but without the permission of the defendants. No opposition seems to have been made to the erection of the poles, but the wires were attached to them and stretched from pole to pole, according to the affidavits read on behalf of the defendants, in defiance of their power, and only by the exercise of superior force. The bill charges that the defendants intend to destroy the line by cutting the wires where they overhang the streets, and asks that they be enjoined.

When the order to show cause was applied for in this case, strong doubts were expressed whether the bill stated

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any fact which could properly be regarded as the act of the defendants as a municipal body, that would authorize the interference of this court. The bill simply charged that certain officers of the town had opposed the hanging of the wires, and that one of them, claiming to represent the town, threatened, if the wires were put up, that the town would cut them down. The bill exhibited such a meagre case that I hesitated to grant the order to show cause. All doubt upon this subject has, however, been dissipated by the defendants. They answer the order to show cause, not by disclaiming responsibility for the conduct of their officers, but attempt to show that, as a municipal body, they resisted the erection of the wires by force, almost to riot and bloodshed. They do not attempt to deny or conceal the fact that it is their purpose, if relieved from restraint, to commit the injury against which the complainants appeal to the court for protection.

There can be no doubt that the injury apprehended belongs to the class which it is the duty of a court of equity to prevent *in limine*. If the wires are cut or broken, even at a single point, the line between its principal termini is completely destroyed. Unless the mischief threatened is prohibited at the very outset, it is undeniable the complainants must suffer serious and irreparable loss.

The complainants were organized under the general telegraph law (*Rev. p. 1174*). The eighth section is the only part of the act containing anything material to this controversy. It first grants to any corporation organized under it, the right to use the public highways of the state for the purpose of erecting posts or poles, upon first obtaining the consent, in writing, of the owners of the soil. It then provides that no posts or poles shall be erected in any street of any incorporated town, without first obtaining from the town a designation of the streets in which the same shall be placed, and the manner of placing the same. This, beyond all doubt, must be construed to be a plain inhibition against the use of the streets by any telegraph company, for the

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purpose of erecting their poles therein, without first applying to the municipal authorities for direction as to where and in what manner they shall be erected. The legislative purpose is very plain. The design is to invest telegraph companies with the right to use the streets of an incorporated town for the purpose of erecting their poles therein, subject, nevertheless, to such municipal control as shall be necessary to secure to the public, safety, convenience and freedom in the use of the streets. The municipal authorities may say what streets shall be used, at what points in the streets the poles shall be erected, and how they shall be planted and secured, but they have no power to lay an embargo. They have a right to regulate, but not to interdict. And their regulations, to be valid, must be reasonable and fair. But this provision has no application to the case in hand. The complainants have erected their poles outside of the streets, on private property, and so long as the poles in no way imperil the safety of those who use the streets, the town authorities can lawfully exercise no control over them.

But another part of this section must be considered. By the last clause, it is enacted, "That the use of the public streets, in any of the incorporated towns (by any corporation organized under this act), shall be subject to such regulations and restrictions as may be imposed by the corporate authorities." The clause previously considered related only to such use of the streets as would be made if poles were erected therein; the clause just quoted is much broader, and comprehends any use which can be made of them by a telegraph company. It comprehends hanging wires over the roadway. The public easement is not limited to the use of the soil of the highway, but extends upward indefinitely. A barrier stretched above the roadway, or the bough of a tree overhanging it, may constitute a nuisance *Barber v. Roxbury*, 11 Allen 320; *Angell on Highways* § 223

Under this clause the town authorities may adopt regulations fixing the elevation at which telegraph wires shall

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cross the streets, and they may also prescribe such other precautions as may be reasonably necessary to the safety of travel. But no such regulations have been adopted by the defendants. So far as appears, the town authorities have never even entered upon the consideration of the question, whether it is expedient or not to exercise the power given to them by this clause. When, by appropriate proceedings, they shall have prescribed regulations on this subject, the complainants will be obliged to conform to them, but, in the meantime, they cannot compel the complainants to desist from the further construction of their work.

Upon the facts before me, there is no reason whatever to believe that the wires, as they now overhang the streets, do, in the slightest degree, impede or endanger their full, free and safe use. I am of opinion that the complainants, in erecting their poles on private property, and in hanging their wires on them at an elevation of twenty-five feet above the roadway, did nothing but what they had an unquestionable, legal right to do, and that the defendants should be enjoined from cutting the wires, or otherwise unlawfully interfering with them.



CASES
ADJUDGED IN
THE PREROGATIVE COURT
OF
THE STATE OF NEW JERSEY,
OCTOBER TERM, 1879.

THEODORE RUNYON, ESQ., ORDINARY.

DANIEL H. LEE and others, appellants,

v.

DAVID S. SCUDDER, executor, respondent.

Intermittent mental delusions resulting from and depending entirely on disease, and from which the testatrix was at other times free,—*Held*, not to have affected her testamentary capacity, it appearing that, when she executed her will, she knew what property she had, where and what it was, to whom she desired to give it, and why she selected her legatee and omitted others, and manifested no delusion.

Appeal from the decree of the Union orphans court, admitting to probate a paper writing purporting to be the last will and testament of Betsy Marsh, deceased, late of that county.

Mr. J. Henry Stone, for appellant.

Mr. W. J. Magie, for respondent.

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THE ORDINARY.

Betsy Marsh, a single woman, late of the county of Union, died there on the 7th of April, 1876, at the house of David S. Scudder, in the township of Westfield. She was then about sixty-five years old. She was eccentric. Her eccentricity displayed itself principally in her dress, which was somewhat peculiar, and in her language, which was sometimes very coarse. She died of a disease of the brain, after an illness of not many days' duration. The particular character of the disease seems not to be very exactly defined by the expert testimony which has been adduced. Her malady appears to have given rise to delusions at an early stage of it. One effect of its presence was to fill her mind with a distressing presentiment of impending death. On the 6th of May, 1857, nearly nineteen years before her death, she had made a will by which, after providing for the payment of her debts and funeral expenses, she gave to Daniel H. Lee half of her estate, except her clothing and household goods, which she gave to Sarah Lee, widow of Gershom Lee, and gave to Sarah Lee and Ezra D. and Charlotte Hetfield, all the residue of her estate. On the 29th of March, nine days before her death, she went to the house of Mrs. Phebe M. Hetfield, who lived in the immediate vicinity of David S. Scudder (the houses being a very short distance apart, with none intervening), and remained there until the 3d of April following, when she left that place and went to David S. Scudder's house, and there, on the 5th of April, two days afterwards, she executed her last will and testament, by which she gave her property to Mr. Scudder. He was her cousin, and for many years she had made his house her home, though from time to time she had stayed at other places among her relations. Between the 29th of March and the 3d of April, while she was at the house of Phebe Hetfield, it appears that she was the subject of delusions of such a character as to indicate the existence of mental disease. There is some contrariety, however, in the evidence, as to the extent of

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these aberrations. I do not deem it important to consider the evidence on this head, inasmuch as it appears to be quite clear that the delusions to which I have referred were the consequences of her disease, and the disease itself was intermittent, and it is clear, from the proof, that there were periods, whole days together, at least, after that time, when she was free from them. Her property appears to have consisted mainly of a bond and mortgage and a deposit in the savings bank. On Tuesday, the 2d of April, the day before the will was made, she seems to have been engaged in assisting in the ordinary household duties of the family. She retired to bed between eight and nine o'clock. At a very early hour (about three o'clock) the next morning, she came to the door of the room in which Mr. and Mrs. Scudder slept, and applied for admittance. On being admitted she sat down in a chair near the door. She said that she could not live a great while, and would rather that Mr. Scudder should have what little she had than any one else. Mr. Scudder endeavored to relieve her mind of the presentiment by assuring her that she was not about to die, and told her to go back to her room and go to bed. She did so. Not long afterwards she came again to his room and said to him, "Smith (addressing him by his middle name), I want to give you this mortgage and bank-book, and I wish I could hand them to you right in your hand;" to which he replied, "Betsy, you know you can't do that; you would be sorry for it if you did, afterwards;" to which she answered, "If I get well you can easily hand them back to me." He again persuaded her to return to her room. She came back again to his room, shortly afterwards, and then said, "I want to give you this mortgage and this bank-book; the will I have made don't give you anything; I want you to go and get Dr. Kinch to come and do some writing for me." Mr. Scudder said to her that he thought it was not worth while, and she replied, "Yes, it is; I shan't live long, and it makes no difference whether I live or die, I want you to go and get Dr. Kinch."

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Dr. Kinch was a physician long a resident in the village of Westfield. He frequently drew wills. He was not the attending physician of the testatrix. Her physician was Dr. Stryker. About five o'clock in the morning Mr. Scudder went for Dr. Kinch, and he and the doctor reached his house at about six. It appears from Dr. Kinch's testimony that he had been for a long time well acquainted with the testatrix. He says that when he met her at the house she said to him, "Doctor, I want you to do some writing." He asked her what she wanted him to do, and she said that she wanted to make her will, and wanted it done right away. He told her that it was necessary to have another witness besides himself. He suggested that Samuel Hetfield, son of Phebe Hetfield before mentioned, should be sent for as a witness, but she objected, and suggested Mr. French, a neighbor, who was sent for accordingly. She wished Dr. Kinch to act as executor, but he declined. They then went into a room together. He asked her if she had ever made a will before. She said she had. She remarked, "You want to see if I know what I am doing. I know what I am doing, just as well as I ever did." The doctor then said, "Well, Betsy, it is necessary for me to know whether you are competent to make a will or not." She replied, "I know just as well what I am doing as I ever did, and I want it done right away." He then asked her how she wished to dispose of her property, and she told him the manner, and he drew the will accordingly. After he had drawn the will he read it to her, paragraph by paragraph, and asked her if that was what she wanted, and she replied, "Yes." The will was then executed by her in the presence of the doctor and Mr. French, with due formality. It should be stated that when he asked her if she had ever made a will before, she said that she had done so while she was living at Mr. Lee's. That she had had it drawn while she was living there. She did not say what disposition she had made of her property in that will, but rather evaded the question. In her conversation pre-

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vious to the execution of the will, she told the doctor that she would burn her property all up before she would give any of it to the Marsh family. By way of explanation, she said that they had not given her much attention, had never befriended her, and the doctor thinks that she mentioned, as a cause of complaint, that they did not notify her of her father's death until after he was buried. As indicating the condition of her mind, it may be stated that, while the doctor was writing the will, she remarked that she had not had much enjoyment in this world, and she did not know whether she would have much in the world to come. She also said that she "expected there would be a great time after she was dead and gone, by her friends' overhauling her wonderful room," at Mrs. Hetfield's, where she kept her clothing and her mother's clothing. She added that she supposed there would be a great time amongst her old clothing, after she was dead and gone, but she did not care anything about that; they might, do as they had a mind to, it would not affect her, one way or the other. It appears that she had, for many years, rented a room in the house of Phebe Hetfield, where she kept her garments, and those of her mother (one of her eccentricities being the keeping, unused, her dresses, which were made of coarse material, and were of unfashionable cut), and she had, in that room, dresses of her own and her mother's, which she had kept there for many years.

Before the doctor began to draw the will, she showed him a bond and mortgage for \$1,000, and a savings-bank book, and said she wanted to give the mortgage to Smith Scudder. She also said that wherever she was when she came to die, those who took the best care of her should have her property. After the will was executed, the doctor folded it up and handed it to her, and asked her what disposition should be made of it. She told him to take it and keep it. He did so. Afterwards, and on the same day, after the doctor had gone, she put on her dress and shawl and went out. She said that she had forgotten some things which she

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desired to put in her will. They were, a legacy of \$100 to the Baptist Church at Scotch Plains, of which she was a member, and a provision for a head-stone for her grave, to cost \$200. As she left the house, she said she was going to take a walk, and might go as far as Theodore Hetfield's (he was a near neighbor), and, if she did, she would spend the day there. She went to Theodore Hetfield's house, and, while there, spoke of her desire to alter her will in the particulars just referred to. Mr. Hetfield called in her physician, Dr. Stryker, who happened to be passing. The doctor undertook to make the alteration for her, but thought that it was necessary to redraw the will. He proceeded to do so. After he had drawn so much of the will as provided for the payment of her funeral expenses and just debts, and for the head-stone at her grave, he stopped writing, and suggested to her the propriety of making a bequest to the children of a Mr. Gardner, in whose family she had lived, and of whose children she appeared to be very fond. To his suggestion she made no answer except by shaking her head, signifying an indisposition to make the bequest. It appears that the drawing of the will was no further proceeded with. Mr. Hetfield suggested that a difficulty might arise with respect to the validity of the will, because of the fact that there would be two wills, that drawn by Dr. Kinch in the morning, and the one upon which Dr. Stryker was engaged, both dated on the same day. The further preparation of the will was postponed until later in the day.

In her instructions to Dr. Stryker, the testatrix told him that she wanted to give a legacy of \$100 to the Scotch Plains church, to have her funeral expenses paid, and \$200 spent for a head-stone, and the rest of her property was to go to Smith Scudder. She requested that Dr. Kinch should be sent for to make the alteration, and Dr. Kinch and Dr. Stryker came in the evening. She informed Dr. Kinch of the alteration she desired to make. He, also supposing it was necessary to draw a new will, took the will, which he had brought with him, out of the envelope in which it was

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and proceeded to tear off the fly-leaf, and was about to destroy the will. She prevented him from doing so, saying: "Don't burn it up until there is another one made," and thereupon he folded up the will and put it in the envelope and gave it to Theodore Hetfield, to be kept by him. Dr. Kinch testifies that he told her that he understood she was not satisfied with the will he had made, and that she answered that all the change she wanted to make was that she wanted to give to the Baptist church \$100, and spoke about a head-stone to cost \$200.

It seems that the writing of the will was deferred until the next morning, because of the fact of the testatrix's unwillingness to make a disposition in favor of the Gardner children. Dr. Kinch testifies that before he left Theodore Hetfield's house, the testatrix joined the family, and was, with them, entertained with music. The next morning, before breakfast, she left that house, and appears to have drunk several times, immediately thereafter, of wine which she had in a bottle. Her habits were temperate, but she used wine occasionally, in very small quantities, as a medicine. It seems that, not long afterwards, she was found in what appeared to be an intoxicated condition, in the woods not far distant, whence she was taken to the house of Mr. Scudder. From that time she appears to have been quite ill, and the next morning she suddenly fell dead.

The only question which was presented to the court upon the hearing of this appeal was, whether the testatrix, at the time of making the will drawn by Dr. Kinch, was of sound and disposing mind. That she was not laboring under any delusion when the will was made, is abundantly evident from the testimony. It does not appear that, at any time, she labored under any delusion in respect to any person who would otherwise, probably, have been the object of her bounty. Her delusions were evidently such as resulted from disease, but, as before remarked, the disease manifestly was an intermittent one, and there were times when she was free from the delusions, and was rational and of sound

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and disposing mind, memory and understanding. When the will was drawn, she knew what property she had, and where it was, and what it consisted of, and to whom she desired to give it, and the reason why she selected the person to whom she gave it, as the object of her bounty. She also gave her reason for passing by others in the disposition of her property. The testamentary witnesses, one of whom was an expert, had both of them known her for a long time, and testify very clearly and positively to the soundness of her mind at the time of the execution of the will. Other witnesses, notably Theodore Hetfield and his wife, who saw her on the day on which the will was drawn, give equally convincing evidence as to her testamentary capacity. Whatever her disease was, and however it may be characterized technically, it is clear that it could not have been one which affected the brain so that, when once it had taken hold of the patient, it never released its hold. The proof forbids such a conclusion. Among the witnesses who testified to the soundness of her mind and testamentary capacity, is Dr. Stryker, who was her attending physician during her illness, and up to her death.

The decree of the orphans court will be affirmed.

In the matter of the guardianship of ALFRED J. FLINN.
a minor.

It is no proof of waste, in a proceeding to remove a guardian who personally responsible, that he has incurred liability to pay court fees in a controversy over his management of the ward's property since such fees, if unlawful or unnecessary, may be disallowed in account; nor, that he has paid reasonable commissions to a broker for renting and collecting the rent of his ward's real estate.

On appeal from the decree of the Mercer orphans court.

Flinn's Case.

Mr. W. D. Holt, for appellant.

Mr. I. W. Lanning, for respondent.

THE ORDINARY.

Alice Flinn, step-mother of Alfred J. Flinn, the minor, filed her petition in the Mercer orphans court, stating her belief that Michael Flinn, the guardian of Alfred, who was appointed by that court, was wasting and mismanaging the estate of the minor, whereby the latter might come to loss, and she thereupon prayed that the guardian might be removed and the letters of guardianship issued to him revoked, and some suitable person appointed in his stead. On this petition a rule to show cause was granted, under which testimony was taken, and on the 29th of July, 1878, an order was made by which it was recited that the court was satisfied that the allegations of the petition were true, and it was thereupon ordered and decreed that the letters of guardianship issued to Michael Flinn be annulled, and that letters of guardianship of the minor be issued to Lewis H. Van Horn, of the city of Trenton. From this decree Michael Flinn appealed to this court. It appears, by the testimony taken in the court below, that Patrick Flinn, the father of the minor, died in 1874, leaving a small house and lot in the city of Trenton; that the petitioner was his second wife; that, after the death of Patrick Flinn, his widow continued to occupy the property, taking care of the child up to the 26th of March, 1878, the occupation of a part of the property and the rent which she received from the rest, being regarded and accepted by her as satisfaction for the board and lodging of the boy, and her care and attention to him. It appears that a difficulty arose between her and the guardian in respect to the custody of the child, who is now thirteen years old. It resulted in her leaving the premises, taking with her the boy, whom she still keeps, and the guardian taking possession of the property. The application to remove the guardian grew out of this difficulty. It will

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be seen that the ground stated in the petition is the wasting and mismanaging of the estate of the minor. The evidence falls very far short of establishing it. The guardian appears to have set about making certain repairs to the property after Mrs. Flinn left it. He introduced the water from the water-works, papered one or more of the rooms, and he soon after, through an agent, rented the premises to a tenant at thirteen dollars a month. It appears that he agreed to pay the agent ten per cent. for renting the premises and collecting the rents. It is also charged, that he has incurred, in the controversies between him and the petitioner, considerable legal expenses which were unnecessary. It is also said, that he has failed to file his inventory as by law he was required to do, and that it appears that he has not invested, but has used in his own business, a small sum of money belonging to his ward. He appears to be abundantly able to account for and to pay over the money on demand. He declares his willingness to take the boy, and support him free of charge, in his own family, caring for him as his own son. He is the brother of the boy's father, and his wife is the sister of the boy's mother. On the other hand, the petitioner, the boy's step-mother, declares her willingness also to take charge of the boy, and, if permitted to have the use and rents of the house, to provide for the boy.

The sole question before the court was, whether the guardian was wasting and mismanaging the estate of the ward, and not, whether it would be more desirable that his step-mother should continue to have the possession of, and care for him, and, in consideration thereof, have the use of the property. The guardian is, by law, guardian of the person as well as of the property of the ward.

The fact that the guardian desired to obtain possession of the boy was obviously no reason for the action of the court. For any failure on his part to discharge the duties required of him by law in respect of accounting for the estate of the ward, he is amenable to the law, and, for cause, may be removed on that account. But I have looked in vain in this

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evidence for proof that he has been guilty of that with which he is charged in the petition, and for which he was upon trial before the court. That he has incurred liability to pay counsel fees in the controversies between him and the petitioner, is no evidence of waste. Those fees will not be allowed in his account against the minor, if they are not lawful, and were not reasonably necessary. And so, too, in regard to the commissions for letting the property and collecting the rent, and the work done to the property. The charges for them will be subject to the scrutiny of the court.

The decree of the orphans court will be reversed.

ELIZABETH RANDALL, appellant,

v.

JOHN BEATTY and WESLEY BEATTY, respondents.

1. Where one will is revoked by another, the revocation is testamentary, and the revocation of the latter will revives the former.

2. A testatrix executed several wills, all of which she destroyed, except one executed in 1870. By a will made in 1873, she expressly revoked all former wills, and delivered to a legatee therein a paper which she represented to be the will of 1870, with directions to destroy it, and that paper was destroyed. She afterwards cancelled the will of 1873. After her death, the will of 1870 was found, carefully preserved among her effects.—*Held*, that the cancellation of the will of 1873 revived that of 1870, and that the testatrix's imposition upon her legatee as to destroying the will of 1870 did not affect it, nor would evidence of her verbal declarations of revocation.

On appeal from decree of Somerset orphans court, admitting to probate a paper purporting to be the will of Ann Rider.

NOTE.—Most of the cases relative to the effect upon a prior will of the destruction of a subsequent one which revoked the prior one, may be found in 1 *Wms. on Ex'rs* 178; 2 *Am. Lead. Cas.* 518; see, also, *Colvin*

 Randall v. Beatty.

Mr. J. Kearney Rice and Mr. J. D. Bartine, for appellant.

Mr. H. M. Gaston, for respondents.

THE ORDINARY.

The question presented in the arguments of counsel is, whether the revocation of a posterior will, which contains an express revocation of all former wills, is, of itself, a revival of the former will. The proof in the cause shows that the testatrix, in 1870, executed, with due formalities, the will propounded for probate. By it, she gave all her household goods and wearing apparel to her sister Mary Ann Beatty, and all the residue of her property to her nephews John and Wesley Beatty, sons of Mary Ann Beatty, with provision that if they, or either of them, should die, leaving no children, the property should go to their sisters and their children. In 1873, she executed another will, wholly inconsistent with that of 1870, giving all her property to her niece Jane Ruckman, and expressly revoking all former wills. It is admitted that the will of 1873 was cancelled by her.

Jane Ruckman and her husband both testify that, when the testatrix executed that will, she delivered to the former

v. Warford, 20 Md. 358; *Rudisill v. Rodes*, 29 Gratt. 147; *Harwell v. Liveley*, 30 Ga. 315; *Dickinson v. Swatman*, 6 Jur. (N. S.) 831; *Newton v. Newton*, 12 Ir. Ch. 118.

Will a former will be revived by the fact that a subsequent one, revoking it, cannot be found after testator's death. *Helyar v. Helyar*, 1 Lee 472; *Brown v. Brown*, 8 B. & B. 876; *Legare v. Ash*, 1 Bay 464; *Jones v. Murphy*, 8 Watts & Serg. 275; *Nelson v. McGiffert*, 3 Barb. Ch. 158; *Dawson v. Smith*, 2 Houst. 92; *Wallis v. Wallis*, 114 Mass. 510; see *Day v. Day*, 2 Gr. Ch. 549.

Will a wife's surviving her husband revive a will revoked by her marriage. *Hodsdon v. Lloyd*, 2 Bro. C. C. 534; *Doe v. Staple*, 2 T. R. 684; *Long v. Aldred*, 3 Adlams 48; *Brett v. Rigden*, Plowd. 343; *Walker v. Hall*, 34 Pa. St. 483; *Garrett v. Dabney*, 27 Miss. 335; *Morton v. Onion*, 45 Vt. 145; *Tuller's Case*, 79 Ill. 99.

Will the death of a child unprovided for by the will, before the testator, revive a will revoked by its birth. *Emerson v. Boville*, 1 Phillim. 342; *Barrow v. Baxter*, 2 Phillim. 261 note; *Ash v. Ash*, 9 Ohio St. 383; see 4 Kent *526; *Morse v. Morse*, 42 Ind. 365.—RMP.

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a paper, which she said was the Beatty will, and directed her to destroy it, to burn it. According to Mrs. Ruckman's testimony, the paper answered the description of the Beatty will, and appeared to have been cancelled. It was not that will, however. The rule on the subject of the revival of a prior will by the revocation of a later one containing words of revocation, was, up to 1838 (when, by the enactment of a statute (*1 Vict. Ch. 26*), the question was put at rest), different in the courts of common law and the ecclesiastical courts in England, the former holding that the revocation of the later will, of itself, worked a revival (*Jarm. on Wills 122, 123*), while the latter held that, whether there was a revival or not, was a question of intention. *Usticke v. Bawden, 2 Addams 116*.

The will of 1870 was never cancelled. If the testatrix gave to Mrs. Ruckman a paper which she declared was that instrument, the only reasonable construction of the act is, that she thus intended to delude the Ruckmans, with whom she then proposed to live in their family, as to her design, and to induce them to believe that she had, in addition to making a will in favor of Mrs. Ruckman, cancelled the Beatty will. The will of 1870 was, at her death, found among her effects, in an envelope, with a copy of her deceased husband's will. It was entirely in her own handwriting. The law declares the manner in which a will is to be revoked. It must be by burning, cancelling, tearing or obliterating it by the testator, or in his presence and by his direction and consent, or by a writing executed with the same formalities as a will. No proof of declarations of revocation, made by the testator, will avail. *Boylan ads. Meeker, 4 Dutch. 274, 285*. The will of 1870 is produced uncanceled. It is admitted that there is no revocatory will or writing extant, but it is alleged that all such instruments subsequently made by the testatrix, have been cancelled. The execution of the will of 1873 was not attended or followed by the cancellation of the will of 1870. Notwithstanding the revocatory clause in the will of 1873, the will

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of 1870 was retained by the testatrix uncanceled, up to the day of her death. The fact that she so kept the will is the most cogent evidence of her intention that it should be revived by the cancellation of the will of 1873.

In *Usticke v. Bawden*, *ubi supra*, the court said that the fact that a testator kept the prior will in her possession after the making of the later one, which expressly revoked the former, would raise a strong presumption that he meant that it should revive on the cancellation of the revocatory will. In this case, this presumption could not be overcome by the hearsay testimony (for it is incompetent for the purpose) of witnesses as to the statements of the testatrix, before referred to. They say she said that she had destroyed the will of 1870; that she had destroyed all her wills; but the will of 1870 itself furnishes demonstration that she had not done so. It is in evidence that she made numerous wills, one in favor of her sister, Mrs. Neil, before 1870; a will executed in the presence of Elizabeth Thomas and her sister, about 1868 or 1869; the Beatty will, in 1870; the Ruckman will, in 1873, and a will executed in the presence of Mr. and Mrs. Mack, in 1875. It also appears that, though for the last three or four years of her life she was not favorably disposed to any of her sisters, she was as much so towards Mrs. Beatty as any of them, and that she always spoke well of the sons of the latter, John and Wesley. Whether the cause be judged by the rule of the English common law courts, or that of the ecclesiastical tribunals, as those rules were prior to the statute of 1838, the will of 1870 is entitled to be admitted to probate. The true rule on the subject is, that where one will is revoked by another, the revocation is testamentary, and the revocation of the latter will revives the former.

The decree of the orphans court will be affirmed.

 Brothers v. Pickel.

ELLA A. BROTHERS and her husband, appellants,

v.

B. NEWTON PICKEL and others, respondents.

The nineteenth section of the orphans court act (*Rev. p. 756*), provides that when a caveat shall be filed against the probate of a will, the orphans court *may*, on the application of the caveators, or the persons named as executors in the will, certify the question involved in the controversy, into the circuit court of the county, for trial before a jury.—*Held*, that such certifying was merely discretionary with the orphans court, and that the provision of the act was not mandatory.



On appeal from the decree of the orphans court of Hunterdon county, admitting to probate a paper purporting to be the last will and testament of Adrian H. Pickel, deceased.

Mr. John Schomp, for appellants.

Mr. J. N. Voorhees, for respondents.

NOTE.—In the following cases the word “may” has been held to be mandatory :

Rex v. Barlow, *Carth.* 293, *Salk.* 609, that church wardens may make a rate. Also, *Rex v. Derby*, *Skin.* 370.

Blackwell's Case, 1 *Vern.* 152, that the chancellor may grant a commission of bankrupt.

Rex v. Hastings, 1 *Dowl. & R.* 148, that the mayor * * * might for the future hereafter have and hold * * * a court of record.

Ticknor v. McClelland, 84 *Ill.* 471, that a chattel mortgage may be acknowledged before a justice of the peace of the town or district where the mortgagor resides.

State v. State Canvassers, 36 *Wis.* 498, that if any election returns shall be found to be so informal or incomplete that the board cannot canvass them, they may dispatch a messenger to the inspectors who made the returns, etc.

People v. Brooks, 1 *Den.* 457, that affidavits may be taken before commissioners of deeds. See *Caniff v. New York*, 4 *E. D. Smith* 430.

Adriance v. Supervisors, 12 *How. Pr.* 224, that supervisors may correct an erroneous assessment.

Randolph Co. v. Rolls, 18 *Ill.* 29, that all actions against any county

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THE ORDINARY.

The sole question presented for decision upon this appeal is, whether, under the provision of the nineteenth section of the orphans court act (*Rev. p. 756*), that when a caveat shall be filed against the probate of a will, the orphans court may, on the application of the caveator, or of the persons named as executors in the will, certify the question involved in the controversy into the circuit court of the county, for trial before a jury, it is obligatory upon, or merely discretionary with, the orphans court to certify. Where the word "may" is used in a statute authorizing, as that section does, an unusual method of procedure on the part of the court for the determination of a question, it is not mandatory, but indicates an intention on the part of the legislature to leave it to the discretion of the court to take such proceeding or not, according to its judgment.

The decree of the orphans court will be affirmed.

may be prosecuted in the circuit court of that county; also, *Schuyler Co. v. Mercer Co.*, 9 Ill. 20.

Rockwell v. Clark, 44 Conn. 534, that when any married woman shall carry on any business, and any right of action shall accrue to her therefrom, she may sue upon the same as if she were unmarried. See *Rumsey v. Lake*, 55 How. Pr. 339; *Van Cleve v. Rook*, 11 Vr. 25.

Mason v. Pearson, 9 How. 248, a provision that a municipality may sell one lot for the taxes assessed on several, restricts them to selling only one if that will produce the amount. See *Thompson v. Carroll*, 22 How. 434.

Walley's Case, 11 Nev. 260, that the court may, of its own motion, or on application, set apart for the use of the family of the deceased, all personal property which is by law exempt from execution; also, *Balentine's Case*, 45 Cal. 696.

Steines v. Franklin Co., 48 Mo. 167, that an act concerning issuing bonds for roads etc., provided that, before any expenditures shall be made, the county courts may, for the purpose of information, submit the amount of the proposed expenditures to the voters of the respective counties.

People v. Com'rs, 4 Neb. 150, that county commissioners may let contracts to the lowest responsible bidder.

St. Louis R. R. v. Teters, 68 Ill. 144, that a court may grant a continuance, if the absence of one of the attorneys is occasioned by his being a member of the legislature, and then in attendance on its sessions.

Low v. Dunham, 61 Me. 566, that in proceedings to enforce a maritime lien, the court may issue an order to sell the vessel.

Supervisors v. United States, 4 Wall. 435, that a board of supervisors may, if deemed advisable, levy a special tax.

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Galena v. Amy, 5 Wall. 705, that a city council may, if it believe that the public good and the best interests of the city require it, levy a tax to pay its funded debt.

Phelps v. Hawley, 3 Lans. 160, 52 N. Y. 23, that if a private bridge be destroyed and not rebuilt by the company within a certain time, it shall thereupon become a public bridge, and may be maintained at the expense of the county. See *Newport Bridge Case*, 2 El. & El. 377.

Scully v. Ackmeyer, 2 Cin. 296, that an assessment may be recovered in the name of the city.

Barnes v. Thompson, 2 Swan 313, that a mechanics lien may be enforced by attachment.

Hines v. Lockport, 60 Barb. 378, that a common council may make streets, sidewalks, and repair them; also, *New York v. Furze*, 3 Hill 612; *People v. Brooklyn*, 22 Barb. 404.

State v. Buckles, 39 Ind. 272, that a state auditor may draw his warrant on the treasurer.

Gillinwater v. Mississippi R. R., 13 Ill. 3, that a certain number of incorporators may present a petition to the legislature before they become incorporated. See *Minor v. Mechanics Bank*, 1 Pet. 64.

Blake v. Portsmouth R. R., 39 N. H. 435, that any corporation whose powers expire by limitation, may continue to be a body corporate for three years thereafter, for the purpose of prosecuting and defending suits.

Chicago & A. R. R. v. Howard, 38 Ill. 414, where one section of an act provides that a common informer "may" sue for a penalty, another, that the state's attorney "may" sue, the latter has no exclusive right to bring suit.

In the following cases the word "may" has been held directory :

Banks's Case, 28 Ala. 28, that the trial of any person charged with an indictable offence may be removed to another county, on the application of the defendant, duly supported by affidavit. See *Kelly v. State*, 52 Ala. 366.

Cross v. Pearson, 17 Ind. 612, that in a justice's court, all matters of defence, except &c., may be given in evidence without plea.

Reed v. Bainbridge, 1 South. 357, that an assignee of bonds &c. may maintain an action of debt thereon, in his own name. See *Carhart v. Miller*, 2 South. 575.

Chetwood v. State Bank, 2 Hal. 32, that a plaintiff may assign as many breaches as he shall see fit. See *Shaeffer v. Jack*, 14 Serg. & Rawle 429.

Central R. R. v. Ingram, 20 Kan. 66, that a demand [of damages for killing stock on a railroad] may be made of any ticket agent or station agent of such railway company.

State v. Han. & St. Jos. R. R., 51 Mo. 532, that suit may be commenced by serving the summons on any director &c. of a corporation.

Mitchell v. Duncan, 7 Fla. 13, that on a proceeding to set aside a defective execution, and bond and affidavit given, execution may issue against the party making the affidavit and his sureties.

State v. Holt Co., 39 Mo. 521, that a court, if satisfied that an applicant is a person of good character, may grant him a tavern license.

School District v. Sterrick, 86 Ill. 595, that the certificate of a school teacher may be in the form following [setting out a form]. See *David-*

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son v. Gill, 1 East 64; *Crosby v. School District*, 35 Vt. 623; *Apgar v. Trustees*, 5 Vr. 311.

Lewis v. State, 3 Head 127, that on a jury's recommending a defendant in a capital case to mercy, the court may commute the punishment from death to imprisonment for life.

Com. v. Gable, 7 Serg. & Rawle 423, that in indictments for involuntary manslaughter the attorney-general may, by leave of the court, waive the felony and proceed as for a misdemeanor.

Com. v. Haynes, 107 Mass. 194, that penalties for an offence may be recovered before any court of competent jurisdiction, does not exclude an indictment for the same offence in the superior court. See *Hirschfelder v. State*, 18 Ala. 112; *Barnawell v. Threadgill*, 5 Ired. Eq. 86; *McKoin v. Cooley*, 3 Humph. 559.

Sifford v. Beatty, 12 Ohio St. 189, that in an action against a sheriff for the recovery of property taken under execution and replevied by the plaintiff, the court may, upon application of the defendant in execution, permit him to be substituted as defendant.

Cooke v. State Bank, 50 Barb. 339, that suits against any national bank may be had in any court of the United States held within the district where such bank is established, or in any state court in such district, does not exclude a suit in a state court against such bank located in another state.

Lovell v. Wheaton, 11 Minn. 92, that an award may be returned to any term of court held during the time limited by the submission. See, however, as to time in general, *Birdsong v. Brooks*, 7 Ga. 88; *Stevenson v. Lawrence*, 11 Am. Law Reg. 409; *Free Press Ass'n v. Nichols*, 45 Vt. 7; *Burlingame v. Burlingame*, 18 Wis. 285; *Bowman v. Blyth*, 7 E. & B. 26, 45.

Kane v. Footh, 70 Ill. 587, that the court may, at the request of either party, require the jury to render a special verdict.

Fowler v. Pirkins, 77 Ill. 271, that appeals in certain cases may be taken to the supreme court, does not repeal a prior statute allowing appeals in such cases to the circuit court. See *Hogan v. Devlin*, 2 Daly 184.

Kelly v. Morse, 3 Neb. 224, that the court may require actual notice to be given to either party, when it appears necessary and proper, before acting on an award of arbitrators. See *Cole v. Green*, 6 M. & G. 872; *Corliss v. Corliss*, 8 Vt. 373.

Caldwell v. State, 34 Ga. 10, that of two or more defendants jointly indicted for any offence, any one defendant may be tried separately.

Bansemmer v. Mace, 18 Ind. 27, that public sales of lands may be in parcels, so that the whole amount may be realized. See *Cunningham v. Cassidy*, 17 N. Y. 276.

Allen v. Wells, 22 Ind. 118, that the court, where a cause is transferred to a higher court because the title of land is involved, may tax all costs made in the former court. See *MacDougall v. Paterson*, 11 C. B. 755; *Jones v. Harrison*, 6 Exch. 328; *Crake v. Powell*, 2 El. & Bl. 210.

Darby v. Condit, 1 Duer 599, that the court may, in its discretion, require security for costs of an executor.

Buffalo Plank Road v. Com'rs, 10 How. Pr. 237, that every person liable to do highway labor, living or owning property on the line of any plank road, may, by application in writing, be assessed his proportion of the assessment for the labor on such highway.

Bell v. Crane, L. R. (8 Q. B.) 481, that every authority having power to impose rates, may exempt a building used as a Sunday or ragged school from any rate.

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McMaster v. Lomax, 2 Myl. & K. 32, that the court may issue an attachment for contempt, for want of an answer, "if they shall so think fit."

Cutler v. Howard, 9 Wis. 309, that the court may remove an executor for certain specified causes [although one of the causes exists].

Kelly v. Milwaukee, 18 Wis. 83, that a common council may pass ordinances for abating nuisances etc., as they shall deem expedient; also, *Goodrich v. Chicago*, 20 Ill. 445.

Ridley v. Ridley, 24 Miss. 648, that in attachments against non-residents, the court may order notice of the attachment to be published in a newspaper of the state. See *Cory v. Lewis*, 2 South. 846; *State v. Click*, 2 Ala. 26.

Nave v. Nave, 7 Ind. 122, that in divorce suits, witnesses may be examined orally in open court.

State v. Sweetsir, 53 Me. 438, that an indictment may be found and tried in the county where the offender resides, or where he is apprehended.

Dean v. White, 5 Iowa, 266, that a corporation having an office in any county, may be sued in that county.

Malcolm v. Rogers, 5 Cow. 188, that heirs shall or may recover in one writ or action, as heirs of the deceased person.

New York & E. R. R. v. Coburn, 6 How. Pr. 223, that on an appeal from an award of damages for lands condemned by commissioners, the court may direct a new appraisal.

Striker v. Kelly, 7 Hill 9, 2 Den. 323, that a resolution may not be passed by a common council without calling the ayes and noes. See *McKune v. Weller*, 11 Cal. 57; *St. Louis v. Foster*, 52 Mo. 513.

Williams v. People, 24 N. Y. 405, that for certain stealings the offender may be punished as for grand larceny.

In the following cases "shall" has been construed to be discretionary or directory:

Newcastle Co. v. Bell, 8 Blackf. 584; *Holland v. Osgood*, 8 Vt. 276; *People v. Holley*, 12 Wend. 481; *Thompson v. Sergeant*, 15 Abb. Pr. 452; *Johnson v. Williams*, 2 Tenn. 178; *Att'y-Gen. v. Baker*, 9 Rich. Eq. 521; *York Railway v. Reg.*, 1 E. & B. 858; *Rex v. Leicester*, 9 D. & R. 772; *Reg. v. South Weald*, 5 B. & S. 391; *Caldow v. Pixell*, L. R. (2 C. P. D.) 562; *Wheeler v. Chicago*, 24 Ill. 105; *Parish v. Elwell*, 46 Iowa 162; *Stevenson v. Lawrence*, 11 Am. Law Reg. 409; *City Sewage Co. v. Davis*, 8 Phila. 625; *People v. Supervisors*, 50 Cal. 561; *Rodebaugh v. Sanks*, 2 Watts 9; *Colt v. Eves*, 12 Conn. 243; *Com. v. Com'rs*, 5 Binn. 536; *Ludlow v. Ludlow*, 1 South. 394; *Cason v. Cason*, 31 Miss. 578; *Justices v. House*, 20 Ga. 328; *Catterall v. Sweetman*, 9 Jur. 951.

"It shall and may be lawful," is generally mandatory, *Gray v. Locke*, 3 Atk. 166; *Stamper v. Millar*, 3 Atk. 211; *Simonton's Case*, 9 Port. 390; *Tarver v. Com'rs*, 17 Ala. 573; *Rex v. Eye*, 1 Barn. & Cress. 85; *Chapman v. Milvain*, 5 Exch. 61; *Mason v. Fearson*, 9 How. 237; *Davison v. Davison*, 2 Harr. 171; but see *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 84; *Newburgh Co. v. Miller*, 5 Johns. Ch. 112; *Seiple v. Elizabeth*, 3 Dutch. 407; *Rex v. Com'rs*, 2 Chit. 251; *Bridgman's Case*, 1 Dr. & Sm. 164.

Where any proceeding is "authorized," *Kellogg v. State Treas.* 44 Vt. 356; *People v. Supervisors*, 11 Abb. Pr. 114, 51 N. Y. 401; *Rogers v. Bowen*, 42 N. H. 102; *Milford v. Orono*, 50 Me. 529; *Veazie v. China*, 50

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Me. 518; Com. v. Pittsburgh, 3 Am. Law Reg. 292; Com. v. Johnson, 2 Binn. 275; Gould v. Hayes, 19 Ala. 462; Reg. v. Com'rs, 14 Ad. & El. (N. S.) 459; State v. Harris, 17 Ohio St. 608; Angle v. Runyon, 9 Vr. 403; Harris v. Supervisors, 52 Cal. 554; and see, further, Potter's Dwarries on Stat. 222, note 29.—REP.

WILLIAM H. DICKERSON and others, appellants,

v.

DANIEL DICKERSON, respondent.

The orphans court has jurisdiction, upon the application of the sureties of an habitual drunkard's guardian, to inquire into the solvency of their co-sureties, and, also, into the guardian's management of the estate; and, after citation, to remove such guardian for failure to account, or for waste.

On appeal from decree of Morris orphans court.

Mr. F. D. Smith and Mr. Jacob Vanatta, for appellants.

Mr. G. T. Werts, for respondent.

THE ORDINARY.

William H. Dickerson and John J. Smith, two of the sureties on the bond of Daniel Dickerson, guardian of Stephen Dickerson, an habitual drunkard, applied to the orphans court of Morris county (the court by which the guardian was appointed) for relief. In their petition, they alleged that the guardian was not possessed of much property, and was in doubtful circumstances, and was not, as they believed, worth one-half of the amount (\$20,000) of the penalty of the bond; and that, of the two other sureties, one was dead and the other in failing circumstances, if not entirely insolvent; that they had discovered that the guardian had mismanaged the estate and property; that he had sold, or suffered to be sold and taken away, since he had become guardian, at least \$1,000 worth of wood from

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the land of the estate, and had taken therefor a promissory note, which was uncollected, and, probably, uncollectible; that he had kept no full and true accounts of his receipts and expenditures, and that he had, in various other ways, wasted and mismanaged the estate, whereby they might become liable to loss or damage by reason of their suretyship. They, therefore, prayed that he might be required to account and to give new sureties, and, in default thereof, might be directed to deliver over the estate to them, to be administered according to law, or that he might be displaced, and some other proper person appointed guardian in his stead. On the petition, the court cited the guardian, and, after hearing his testimony, and the testimony of others, by their decree, dismissed the petition, on the ground that they had no jurisdiction to act thereon. From that decree the petitioners appealed to this court.

The act "relative to habitual drunkards" (*Rev. p. 324 § 1*), provides that the court of chancery may issue a commission in the nature of a writ *de lunatico inquirendo*, as heretofore practiced and allowed, and returnable thereto, to inquire into the habitual drunkenness of any person in this state, having real or personal estate therein; and, in case of habitual drunkenness found, by which the drunkard has become incapable of managing his estate, or is wasting it, the chancellor shall cause to be transmitted to the orphans court of the county where the drunkard resides, a certified copy of all the proceedings which may be had thereon, which shall be recorded and filed in the surrogate's office of the county; and, thereupon, the orphans court is directed and required, upon application for the purpose, to appoint a guardian or guardians of the drunkard, who shall have the same power over his estate and perform the same duties, and be subject to the same liabilities, as are conferred upon and required of the guardian of an idiot or lunatic by the act "concerning idiots and lunatics." By this provision, the legislature intended to place the estates of persons duly found to be habitual drunkards, under the like charge and

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government as the estates of persons found to be idiots and lunatics. By the act "concerning idiots and lunatics (*Rev. p. 601*), the orphans court is to appoint the guardian of the idiot or lunatic, and the guardian is to render to the orphans court from which he received his appointment, once in three years, or oftener if required by that court, a true account of his administration, and he may be cited by the court to render such account (*Rev. pp. 604, 605 § 19*). The act also provides (§ 16) that the orphans court, when they shall know or have cause to suspect that the sureties of the guardian of an idiot or lunatic, or any of them, are or is in failing or dubious circumstances, may require the guardian to give additional surety or sureties, and, if he neglects to do so, may displace him, and, on application, appoint another in his stead.

By the orphans court act (*Rev. p. 778 § 118*), it is provided that, whenever application shall be made to the orphans court by which letters testamentary or of administration or guardianship were issued, or to the president judge thereof, by petition, by or in behalf of any person interested in any estate in the hands of any executor, administrator, guardian or trustee, verified by affidavit, alleging that such executor, administrator, guardian or trustee has wasted, embezzled or misapplied the estate entrusted to him, the said court or judge, by an order, may compel discovery to be made of the condition of the estate by the production of books, papers and documents relating to the estate, or the examination of the executor, administrator, guardian or trustee and witnesses, and may take such proceedings for the protection of the estate, by order or decree, as may be taken in like cases in the court of chancery, and compel obedience to such order or decree by the same process and in the same manner as orders or decrees of the court of chancery are enforced.

By another section (§ 120), it is provided that the orphans court shall have power, where letters of administration or guardianship shall have been granted on insufficient

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security, or the sureties on any administration or guardianship bond shall be or become in failing or dubious circumstances, or insufficient for the security of the estate, to order and direct such administrator or guardian to give such further or other security to the ordinary, by bonds, in the usual form, as the court, after hearing creditors or persons concerned, shall approve.

By the one hundred and twenty-third section, it is provided that, if the surety in any bond given by an administrator or guardian, for the execution of his office, shall believe that such administrator or guardian is wasting or mismanaging the estate, whereby the surety may become liable to loss or damage, the orphans court, on application of such surety, and on sufficient reason therefor, may order such administrator or guardian to render an account of his administration or guardianship to the surety, and, if it shall appear that he has embezzled, wasted, misapplied or mismanaged the estate, the court shall direct him to give separate security to his surety for the true payment of the balance remaining in his hands to creditors, representatives of the deceased, or the ward of the guardian, or persons entitled thereto.

It is very clear that the legislature designed not only to place the original appointment of guardians of the estates of persons found to be habitual drunkards under the jurisdiction of the orphans court, but to give to that court the necessary control over the guardians appointed by them, to secure, so far as it might be done by the exercise of the powers conferred on the court to that end, fidelity in the discharge of their duties, and protection, not only to the estates committed to their hands, but to their sureties also. In the case in hand, two of the sureties, by their duly verified petition, complained to the orphans court by which the guardian was appointed, among other things, that one of the sureties was dead, and the other was in failing or dubious circumstances, if he was not indeed entirely insolvent.

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Under the sixteenth section of the act concerning idiots and lunatics, and, also, under the one hundred and twentieth and one hundred and twenty-third sections of the orphans court act, the orphans court had jurisdiction of the matter, and, if they found that the complaint was well founded, had power to require the guardian to furnish additional surety or sureties, and, in case of his refusal or neglect, had power to displace him and appoint a new guardian in his stead. Again, under the nineteenth section of the former act, and the one hundred and eighteenth of the latter one, they had power to compel the guardian to account. Had he refused to account, or had it appeared on the accounting that he had wasted, embezzled or mismanaged the estate, they had power, under the one hundred and twenty-sixth section of the orphans court act, to remove him, and they had power, on removing him, to appoint another guardian in his place.

The decree of the orphans court will be reversed.

WILLIAM H. DE CAMP, appellant,

v.

HENRY WILSON, executor, respondent.

A daughter and her mother, who was very old and infirm, lived together.—*Held*, that the former might recover compensation from the estate of the latter for services which were indispensable and rendered under circumstances that raised a presumption that she was to be paid, and that her mother intended to pay her therefor.

On appeal from the decree of the orphans court of Somerset county.

Mr. J. D. Bartine, for appellant.

Mr. J. Schomp, for respondent.

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THE ORDINARY.

Exception was filed to a charge in the account of the executor, of \$518, the amount of the claim of Catharine McCohn, for her care of, and attendance upon, the testatrix, her mother, for the last five years of the latter's life, and the expenses of the funeral of the testatrix, paid by the claimant. The objection was abandoned, however, as to that part of the claim which is for funeral expenses. The claim for services appears to be at the rate of \$2.50 a week, or \$130 a year, for the first two years of the period, and \$80 a year for the rest of the time. The orphans court allowed the claim, and an appeal was taken from their adjudication. The testatrix, at the time of her death, was about ninety-three years old. About five years before she died, she had a fall, by which she was made permanently lame; so much so, that she was never, from that time, able to walk without assistance. She was almost helpless, and needed constant attendance. Her daughter Catharine, lived with her and took care of her. When Catharine, on one occasion, left her for a short time to make a visit, it was necessary to employ an attendant in her place.

It is urged, on the part of the exceptant, that there was no contract for compensation between the parties, and there appears, in fact, to have been no express contract. But it is evident that the daughter expected to receive compensation for her services, and the mother intended to make it. Mr. Wilson, the executor, testifies that the testatrix often spoke to him about the attention she was receiving from Catharine, and her desire that she should be paid for her services. He says that on an occasion when he, having in his hands about \$1,100 belonging to the testatrix, as her share of the net proceeds of the sale of a farm in which she had an interest, went to her to pay it, she said she wanted to pay Catharine for her services, out of that money, but she did not do so, merely because of his unwillingness to assist in making the payment; his unwillingness being occasioned by his desire to pay over to her the whole of the money due

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her without deduction, in order to avoid misapprehension or misunderstanding which might arise as to his own dealings in the matter, if the payment to Catharine of part of the money due to the testatrix, were part of the transaction. He further says that, some time afterwards, the testatrix sent to him, to rewrite her will, which she desired to alter so that she could "do something for Catharine, as she had done nothing for her yet." He dissuaded her from her purpose, by telling her that Catharine could bring in her bill against her estate for her services, and that the neighbors knew and could testify to their value. He says that, when he next came there, she seemed to have the matter of doing something for Catharine in her will, upon her mind, but he kept putting it off, and when, shortly before her death, she urged him to attend to the alteration of the will, he promised to do so the first of the next week, but, before that time arrived, she died, and, consequently, the alteration was not made.

It is urged, by the respondent's counsel, that this case is within the ruling of the cases in this state, notably, *Ridgway v. English*, 2 Zab. 409, and *Gardner v. Schooley*, 10 C. E. Gr. 150, in which it has been held that an emancipated daughter, residing under her father's roof, and being maintained by him, cannot, in the absence of an agreement, recover compensation for her services in the household. But in such cases, a recovery may be had if the circumstances are such as that a contract may be presumed therefrom. *Ridgway v. English*, *ubi supra*.

Where there is a request, that which might otherwise be regarded as a voluntary courtesy or benefit, will be considered as having been done in pursuance of the request, and a right to compensation will follow. 1 Esp. N. P. 87.

In *Roberts v. Kidd's ex'rs*, 1 Yeates 209, 212, a suit by a niece against her uncle's executors, to recover compensation for services rendered in his family while she was a member of it, and supported by him as such, it was said that if the jury were satisfied, from the whole of the evidence, that the services were done at the request of the

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testator, no matter what the plaintiff's expectations were, the action for compensation might be maintained, and the court held that the question of "request" was very properly left to the jury under all the circumstances.

In *Guild v. Guild*, 15 Pick. 129, the court were divided in opinion as to whether the law raises an implied promise of pecuniary compensation from the mere performance by an adult unmarried daughter residing in her father's house, of useful and valuable services, such as it is customary for daughters to perform; but those of the judges who were of opinion that it did not, were, nevertheless, of opinion that it would be quite competent for a jury to infer a promise from all the circumstances of the case; and that, although the burden of proof is upon the plaintiff, as in other cases, to show an implied promise, the jury ought to be instructed that if, under all the circumstances of the case, the services were of such a nature as to lead to a reasonable belief that it was the understanding of the parties that pecuniary compensation should be made, then the jury should find an implied promise, and *quantum meruit*; but, if otherwise, they should find that there was no implied promise.

In *Green v. Roberts's ex'rs*, 47 Barb. 521, where a daughter, after arriving at the age of twenty-one years, continued to be a member of her father's family, rendering services for him and receiving support from him, as before, there was no positive evidence of an express agreement, but the court said that there being in the case evidence tending to prove a mutual understanding that the plaintiff was to be paid for her services, while at the same time a different construction might be put on that evidence, it was properly left to the jury to say whether such understanding existed.

In *Updike v. Ten Broeck*, 3 Vr. 105, 115, the court said, citing *Ridgway v. English*: "Although the law presumes that the relation of parent and child exists, in the absence of any arrangement to the contrary, when the child continues in the service of the parent after full age, as before,

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yet, that relation ceases when it is shown that compensation was to be made, and that it was so expected by both parties, or that the services were performed under such circumstances as that the expectation was reasonable and proper."

It is a question of intention. But this is not the case of an emancipated daughter, supported by her mother, and rendering service in the household. It is the case of the rendering by a daughter, to an old and helpless mother, of necessary services, which, if not rendered by her, must have been obtained from a stranger for compensation. According to the evidence, it was Catharine who kept the house and supported her mother. Catharine testifies that they lived together, and that she furnished the table. She does not charge for her mother's board, however. Her mother, as before stated, was very old and almost helpless. Mr. Wilson, the executor, says that he saw the testatrix at different times when he was at the house, and that she was "grieving because everything was taken away from her, as it were, and she had no one to lean upon but this daughter of hers." The testatrix could not have lived alone, and could not take care of herself. Catharine's services were absolutely necessary to her. She would have paid Catharine for her services when she received the \$1,100, had not Mr. Wilson refused, for reasons wholly personal to himself, to attend to making the payment. She would subsequently have provided in her will for compensation, but was dissuaded from doing so by him, on the ground that Catharine would be able to get her pay for her services after her death, by claim against her estate. She repeatedly said, and, more especially, during the last year of her life, that she desired that Catharine should be well paid for her services. It cannot be doubted that Catharine, when she rendered the services, expected to be compensated for them, and her mother expected to pay her. The services were of such a character, and rendered under such circumstances, as to raise a presumption that there was a contract to pay for them. There was no mutu-

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ality in the transaction. The mother furnished nothing to Catharine, but, on the other hand, she was dependent on Catharine.

The decree of the orphans court will be affirmed.

ELIAS N. MILLER, assignee &c., appellant,

v.

DAVID MULFORD, assignee, respondent.

1. An assignee, under an assignment for the benefit of creditors, must, within the time limited by statute, except to any duly presented claim which he deems doubtful. The creditor's delay in producing proof of the justness of such claim, does not estop such creditor or his assignee in bankruptcy, from demanding its allowance, nor excuse the assignee's neglect.

2. *Held*, that such assignee might buy an interest of the purchaser of the debtor's real estate at a foreclosure sale under a mortgage thereon; but must account for the value of certain machines which, at the foreclosure sale, were sold as fixtures, although they were afterwards decided by the court to be personalty.

3. The assignee may, for the benefit of the estate, complete unfinished contracts of the debtor, provided he exercises a reasonable discretion.

On appeal from decree of Union orphans court.

Mr. W. P. Wilson and *Mr. W. C. Spencer*, for appellant.

Mr. J. R. English, for respondent.

THE ORDINARY.

The appellant, as assignee in bankruptcy of the late firm of Barton & Spencer, of the city of Elizabeth, caused the respondent to be cited to make his final account as assignee of John Y. Brokaw, under an assignment made under the act "to secure to creditors an equal and just division of the

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estates of debtors who convey to assignees for the benefit of creditors." Barton & Spencer had duly put in, under Brokaw's assignment, a claim of \$2,814.40 against his estate. The respondent filed his account, and the appellant excepted to it. The court, on hearing the exceptions, overruled them all. The only subject, however, which appears to have been particularly considered, was the question whether the appellant was not estopped from asserting his claim to a dividend of the estate by reason of the language and conduct of Mr. Spencer, of the firm of Barton & Spencer, in reference to the claim after it was put in. The court held that he was estopped, and, therefore, had no standing to litigate exceptions to the assignee's account. This conclusion, adverse to the appellant on the ground of estoppel, was erroneous.

The claim was, as before stated, duly filed. It showed the debits and credits of the account between the firm and Brokaw, and a balance in favor of the former. It appears that the assignee, after the claim was received, understood from Brokaw that the latter claimed that there was a balance due him from Barton & Spencer. The assignee, in reporting the claim, stated it at the amount of the balance, \$2,814.40, claimed by Barton & Spencer, and, at the same time, stated that there was an offset in favor of Brokaw's estate of \$2,894.40, which was the amount of credit, as claimed by Brokaw. Thus the credits, as claimed by Brokaw, were stated as an offset against the balance of the account of both debits and credits, as stated by Barton & Spencer.

There appear to have been threats on the part of the assignee to sue Barton & Spencer for the balance as it appeared on the assignee's statement, and promises on the part of Mr. Spencer to attend to the matter of the counter-claims. It does not appear that he ever admitted that the balance of the account was against his firm, and it appears, on the other hand, from Brokaw's testimony, that the latter never claimed that there was a balance in favor of his

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estate. The schedule to his assignment shows various items of indebtedness to Barton & Spencer, amounting to about \$1,900 altogether, and he testifies that, when spoken to by the assignee on the subject of the account, he referred him to the accounts themselves; and, he adds, "I could not tell how the claim was at that time."

Both the assignee and his attorney seem to have concluded that there was no balance in favor of Barton & Spencer, but, as before stated, Mr. Spencer never said so, or made any admission to that effect. Mr. Barton seems to have taken no part in the matter. The duty of the assignee, however, under the statute, was plain. The claim contained the items of the whole account on both sides, and showed a balance, as before stated, in favor of Barton & Spencer, of \$2,814.40, and it was sworn to by Mr. Spencer. The assignee, if he was not satisfied with the justness of the claim, might have excepted to it, and it was his duty to do so if Barton & Spencer insisted upon it and refused to withdraw it. The assignee could not safely assume that the claim was groundless, from any delay in producing proof of it satisfactory to him, or for want of satisfactory explanation.

It appears, by the testimony of the assignee, that when he spoke to Mr. Spencer in regard to the condition of the accounts and the claim that there was a balance due from Barton & Spencer, to the estate of Brokaw, Mr. Spencer promised to bring up his books and settle the matter; and it appears, by the assignee's testimony, that at no time did Mr. Spencer ever admit that the claim which his firm had put in, was erroneous in any respect. From the evidence, it seems quite clear that the assignee misunderstood the statements made by Brokaw in regard to the claim. There was a difference between Mr. Spencer and Mr. Brokaw as to the amount of the credits to be given to the latter; Brokaw insisting that the amount was more, by about \$100, than Spencer was willing to allow. The assignee seems to have concluded that this additional credit thus claimed by Brokaw, was a balance claimed by him upon the whole account,

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whereas it appears, by the schedule to his assignment before referred to, and by his testimony, that such was not the understanding of Brokaw, and that he did not so insist. The assignee having failed to except, according to law, to the claim, is bound by it.

Of the various exceptions to the account, it is important to notice but a few. It is objected that the assignee became the owner, in partnership with Mr. Blancke and Mr. English, of the principal real estate of the debtor. It appears, however, that the purchase was not made at his own sale, but at the sale of the property under a decree of foreclosure of this court, and that he procured a purchaser at that sale, in order to save the property from sacrifice, and subsequently induced the purchaser to sell him an interest in the property. His conduct in the matter was not only not objectionable, but was praiseworthy. He appears to have been actuated by an anxiety to save the property from sacrifice, and by no other consideration. Under such circumstances, he cannot be regarded as having purchased the property in trust, or as trustee. *Earl v. Halsey, 1 McCart. 332.*

It is objected, that there were sold with that property certain machines, as part of the real estate, which, in point of fact, were not parcel of the realty. The assignee consulted distinguished counsel on the subject, before the sheriff's sale took place, and was advised that all the machinery which was attached by belting, as well as that which was attached to the building otherwise, was part of the realty. Subsequently, by a decision in respect to part of this very property (*Blancke v. Rogers, 11 C. E. Gr. 563*), it was held that some of the machines were not so attached to the realty as to become part of it. It was the duty of the assignee to sell the machines, which were personal property. It appears that they have come into his hands under the foreclosure sale. He is bound to account for them.

Objection is also made that the assignee, without the order of the court, proceeded to complete certain contracts which had been made by the debtor, and which were unfin-

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ished at the time of making the assignment. He was at liberty, and it was his duty, to do so, under the circumstances. Where it is manifestly for the benefit and advantage of the creditors and those interested in the estate, the assignee may carry on the business and work up the material on hand which otherwise would be, to a degree at least, unavailable to the estate. *Burrill on Assignments* 444. Of course he is bound to the exercise of a sound discretion. The assignee testifies that he acted in the matter under the direction of the creditors. Opportunity was given, in taking testimony by the exceptants in the orphans court, to inquire into all the particulars in regard to the exercise of discretion on the part of the assignee in this case. He appears to have acted fairly and with due regard to the interest of the estate. Indeed, it appears that, in his desire to advance the interest of the estate, he has already expended about \$3,000 more than he has received or will receive.

The decree of the orphans court will be reversed, with costs.

JOHN Y. CLARK, trustee, and others, appellants,

v.

ELIJAH ROSENKRANS and others, respondents.

The claim of a wife for money handed over by her to her husband, without any definite agreement between them, at the time, as to its repayment,—*Held*, invalid, under the circumstances, as against her husband's creditors.

Appeal from decree of Sussex orphans court, on exceptions to claim of John Y. Clark, trustee of Emma Cole, against the estate of Jason Cole, her husband, in the hands of John S. Howell, his assignee, under an assignment made under the act "to secure to creditors an equal and just

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division of the estates of debtors who convey to assignees for the benefit of creditors.”

Mr. T. Kays, for appellants.

Mr. L. Cochran, for respondents.

THE ORDINARY.

This appeal brings up for review a decision of the orphans court of Sussex county, adverse to the claim of a wife against the estate of her husband in the hands of his assignee, under the assignment act (*Rev. p. 36*), for money which they allege was lent by her to him after the marriage, which took place in 1872. The claim in question is made upon a promissory note given January 16th, 1878, by the husband to John Y. Clark, as trustee for the wife. The note was dated on the day last mentioned, and was payable one day after date, without grace. The purpose in giving it was to secure to the wife a dividend of the estate of the husband, under the assignment which he was then about to make. The estate is largely insolvent without that claim. The alleged debt consisted of two sums of \$800 and \$1,200 respectively (and interest thereon), which the husband and wife allege were received by the latter after her marriage, from her deceased father's estate, and which they say were handed over by her to her husband, and used by him in his business. The first-mentioned sum (\$800) was the amount of a loan made in or about April, 1873, by the mother of the wife, upon the joint and several note of the husband and wife, dated April 30th, 1873, and payable one year after date, with interest. The other sum (\$1,200) was received in March, 1876, as part of the consideration (\$2,000) of the wife's interest in certain land of which the father died seized. The rest of the consideration was paid by the cancellation of the note for \$800. The \$1,200 were paid, and the \$800 note delivered to the wife, at the time of the delivery of the deed of conveyance for her interest in that

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land, and she handed over the note and money to her husband, and he cancelled the former by tearing off the signatures.

No evidence of indebtedness from the husband to the wife was taken at any time, nor was any interest ever paid on the alleged debt, nor any payment made on account of the debt. No payment for principal or interest was ever asked for. When the husband was about to make an assignment for the benefit of his creditors, he, in order to secure to his wife a dividend of his estate, caused the note in question to be drawn by his counsel, and, having previously applied to the person who is named therein as trustee for his wife, and requested him to accept the note and hold it, as trustee, and having obtained his consent, delivered the note to him. He appears to have procured the claim against his estate on the note to be drawn, and, having obtained the trustee's affidavit to it, to have delivered it to the assignee. The proof of the existence of an agreement to repay the \$2,000, which it is claimed were lent by the wife to the husband, rests wholly on their testimony.

It was said, in *Post v. Stiger*, 2 Stew. 554, 556, that a claim by a wife against her husband, first put in writing when his liabilities begin to jeopardize his future, should always be regarded with watchful suspicion, and when attempted to be asserted against creditors upon the evidence of the parties alone, uncorroborated by other proof, should be rejected at once, unless their statements are so full and convincing as to make the fairness and justness of the claim manifest; and that any other course would encourage fraud, and greatly multiply the hazards of business. As to the \$800, the husband testifies that his wife's mother gave his wife her check for \$800, and his wife gave him the check, and he drew the money from the bank upon it; but he swears, also, that he, himself, borrowed the money from his mother-in-law, expecting to repay it. So that the \$800 were lent to him, and his wife was surety for him, and,

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when her interest in her father's land was sold, she allowed the \$800 on account of the consideration. She thus paid his debt of \$800 for him. When the \$1,200 were received by him, no evidence of indebtedness was given by him to her. According to his testimony, the circumstances of the alleged loan were these: When she proposed to sell her interest in her father's land, he expressed his concurrence, and said he would borrow the money and use it on his farm; and, he adds, "That is what we wanted to do, and she lent me the money, and this was before she sold her interest." He further says (and she says so, too, substantially), that he told her he did not "want it given to him," but that he wanted to borrow the money, and she said all right. Previously he said, stating the transaction, "She sold out, and I told her that I would borrow the money." To the inquiry how he got the \$2,000, he replied: "The \$1,200 were in money, and the note (the \$800) we had had and used the money." His reply to the inquiry, when his wife first asked him for a note, shows clearly that she never asked him for any at all, and that the subject of payment to her was only mentioned between them in connection with his failing circumstances. In reply to that question, he said that, in the spring of 1877, he told her that if he could not make any more money than he had the preceding year, that would be the last year that he would be able to carry on the business of farming; that she said: "Are you going to pay me?" He adds, not giving his reply to her question, "I had had her money, and what I was going to do was to pay her her money." From the conversations between him and the person whom he requested to act as trustee, it is apparent that his proposition to repay the money, or even to give a note for it, arose from the fact that he was insolvent, and his property must go to the satisfaction of his creditors. The trustee says that when Cole came to see him to get him to act as trustee, Cole told him his circumstances and position, and asked him to act as trustee for his wife. No consideration passed from the trustee for

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the note. The proof in the cause leads to the conclusion that the \$800 note was paid by the wife for her husband who had borrowed the money; that the \$1,200 were handed over to him by her on no agreement of loan which should be established as against his creditors, and that while there may have been an understanding between them that he would repay her, yet it was not such a definite understanding and agreement as should, under the circumstances, be held to be a contract between husband and wife, as against the creditors of the former.

There is no evidence on which the respondent can be held to be estopped from denying the appellant's claim. Nor could the equity set up against the respondent, in respect to the wife's release of her dower in the farm, if it existed, avail the appellant in this suit. But it does not exist. The wife released her dower under no false representation, or any assurance on the part of the respondent. She appears to have done it to secure a sale of the property. No bidder could be obtained for it without an agreement for such release. With it, it sold for a nominal price only, subject to the mortgage. It would not have brought the amount of the mortgage upon it, on sale under foreclosure.

The decree will be affirmed, with costs.



CASES ADJUDGED
IN THE
COURT OF ERRORS AND APPEALS
OF THE STATE OF NEW JERSEY,
ON APPEAL FROM THE COURT OF CHANCERY,
NOVEMBER TERM, 1879.

WILLIAM SCOTT DE CAMP

v.

EDWARD L. DOBBINS and others, executors.

1. If a testamentary trust is limited to a purpose inconsistent with the statutory policy of the state, the heir at law has a right, in equity, to contest the execution of such trust.

2. This is not of that class of cases in which the public alone can intervene.

3. The word "benevolent," intrinsically considered, includes more than legal charities, but its signification may be narrowed by the context.

4. Where the will limited the trust to a church "to aid the missionary, educational and *benevolent* enterprises to which the church is in the habit of contributing," and it was shown the enterprises referred to were legal charities,—*Held*, that the word "benevolent" could not, in this text, have a signification wider than the word "charitable," and, consequently, the trust was valid.

On appeal from a decree of the chancellor, reported in
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Mrs. E. A. Crane, by her will, after certain devises and legacies, made the following disposition :

"The residue of my estate I give and devise to the North Reformed Church of Newark, in trust that they may use the same to promote the religious interests of the said church and to aid the missionary, educational and benevolent enterprises to which the said church is in the habit of contributing, and I direct my trustee and executors to pass over to the officers of the said church, all property, either real or personal, remaining after satisfying the above-named bequests, and it is my wish that the said church officials shall use and dispose of the said property at such times and in such manner as they shall deem expedient to promote the above-named interests, not holding the said property, however, unexpended or unappropriated for a longer period of time than ten or fifteen years."

It was shown that the residue of the estate would consist of real estate in this state, or the proceeds of the sale thereof. It also appeared that, at the time the will went into force, this church held property the annual value of which was equal to \$2,000.

Mr. Jacob Vanatta, for appellant.

I. The gift is not to the church for its own use.

The will says the gift is "in trust." This excludes the corporation from having any beneficial interest. If it can

NOTE.—In *Morgan v. Taylor, Wright* 144, it was held that the legislature could change the tenure of lands previously conveyed to a religious society; and that the term "society," in a statute providing that each society could take and hold only twenty acres of land, meant each congregation or particular church as distinguished from a general denomination. See *Ayres v. Methodist Church*, 3 Sandf. 351.

In *Cruse v. Axtell*, 50 Ind. 49, a devise of realty and personalty to a Masonic organization, "for the purpose of building a Masonic lodge," was held valid, although the value of the devise far exceeded the limit as to property fixed by statute in regard to such corporations.

In *Baker v. Clark Inst.*, 110 Mass. 88, a charitable corporation was by law authorized to hold \$200,000 worth of property. A testator, in his life-time, gave it \$50,000, and by his will directed his executors to hold his residuary estate until it amounted to \$200,000, and then to pay it to the same corporation. At the time of his death the residue amounted to \$140,000, but, owing to debts &c., his estate could not be settled for two years, at which time the residue exceeded \$200,000. Meanwhile the capacity of the corporation had been largely increased

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take, it cannot take or hold as owner. 1 *H. L. Cas.* 272; *Lewin on Trusts* 15.

II. Independent of the rules governing "charities," the trust sought to be created by the residuary clause is void.

(a) Because the trustee named in the clause in question has no legal power to take or hold the estates devised and bequeathed. *Phelps v. Pond*, 23 *N. Y.* 77.

(b) Because the uses, by reason of indefiniteness and uncertainty, are incapable of execution.

As to the trustee: To constitute a valid use, there must be, in all cases, first, a trustee legally competent to take and hold the property; and, secondly, a use for some purpose clearly defined. *Owens v. Missionary Society &c.*, 14 *N. Y.* 406; *Corporation of Gloucester v. Osborn*, 1 *H. L. Cas.* 283; *Beekman v. Boncer*, 23 *N. Y.* 310.

The society now claiming as devisee is not the one named in the residuary clause. They say that is a misnomer, and that they are the person intended. But they must make that apparent by proof, and no proof upon the point has been given. *Ang. & Ames on Corp.* §§ 99, 185; *Inhabitants &c. v. String*, 5 *Hal.* 323.

The corporate defendant is the creature of the statute (*Nix. Dig.* 802), and it cannot have or exercise any powers

by statute.—*Held*, that it took the residue; also, *Att'y-Gen. v. Clergy Soc.*, 10 *Rich. Eq.* 604.

In *Miller v. Chittenden*, 2 *Iowa* 315, a statute limiting the quantity and value of lands to be held by religious societies, was passed in 1843. In 1844, another act was passed restricting only the purposes for which such lands should be used.—*Held*, that a devise of lands "for the use and benefit of the First Congregational church," without designating any particular purpose to which it was to be applied, the quantity being in excess of the limit of 1843, if made in 1846, was good.

In *Brunnenmeyer v. Buhre*, 32 *Ill.* 183, a declaration of such purposes in a deed of lands to trustees of a society incorporated under the statute, was held unnecessary.

In *Chamberlain v. Chamberlain*, 43 *N. Y.* 424, an act limited to \$4,000 the annual income of any incorporated academy. By a subsequent statute, trusts were authorized to be created for the benefit of any incorporated college or other literary incorporated institution &c., without any limit as to the amount or value of such trust fund.—*Held*, that a bequest to an academy of a fund which annually produced more

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except such as are expressly, or by necessary implication, conferred upon it. *Bank of Augusta v. Earle*, 13 Pet. 519; *Black v. Del. & R. C. Co.*, 9 C. E. Gr. 474; *State v. City of Elizabeth*, 4 Dutch. 103; *State v. Newark*, 2 Dutch. 519; *Trenton Mut. Life Ins. Co. v. McKelway*, 1 Beas. 133.

The corporation cannot take as proprietor *sui juris*, but only in trust, and but for one *cestui que trust*, "the said congregation." This is the power given, and all that is given. And all powers not given are excluded *expressio unius est exclusio alterius*. *Broom's Legal Maxims* 505, 515; *Vesey v. Jamson*, 1 Sim. & Stu. 69.

The third section of the "act concerning corporations" (*Nix. Dig.* 168), which applies to ecclesiastical as well as to lay corporations, declares that "no corporation shall possess or exercise any corporate powers except such as shall be necessary to the exercise of the power so enumerated and given." 1 *Perry on Trusts* § 43; *In re Howe*, 1 Paige 214.

In *Trustees of Phillips Academy v. King*, 12 Mass. 546, it was held that an aggregate corporation is capable of taking and holding property, as a trustee, for religious uses, but in that case the corporation had express and full legislative authority to do so. *Ang. & Ames on Corp.* §§ 166–169, 220; 2 *Kent Com.* 279, 280; *Vidal v. Girard's ex'rs*, 2 How. 127; *Green v. Dennis*, 6 Conn. 293; *First Parish in Sutton v. Cole*,

than \$4,000 was void, as to the excess. See *Tucker v. St. Clement's Church*, 3 Sandf. 242, 8 N. Y. 558; *Williams v. Williams*, 8 N. Y. 525, 4 Denio 542.

In *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633, 758, where a gift at the time did not exceed the statutory limit, a subsequent increase in value of the property, far beyond such limit, was held not to justify a forfeiture of the charter; also, *Humbert v. Trinity Church*, 24 Wend. 630; *Att'y-Gen. v. Grocers Co.*, 6 Beav. 526.

In *Cromie v. Louisville Soc.*, 3 Bush 365, a devise of lands in Kentucky to a corporation of New York, exceeding the quantity that such corporation could, by the laws of New York, hold, was, as to the excess, held void. See *Starkweather v. Amer. Bible Soc.*, 72 Ill. 50; *Fellows v. Miner*, 119 Mass. 541.

In *Ticknor's Estate*, 13 Mich. 44, a bequest was made to a corporation (by name, but not, in fact, then incorporated) of New York.—Held, valid, notwithstanding a statute of Michigan provided that no corporation for religious purposes should be recognized as existing by the

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3 Pick. 237; *Theological Seminary of Auburn v. Cole*, 18 Barb. 360; *Brewster v. McCall*, 15 Conn. 274; *Furgeson v. Hedges*, 1 Harring. 524; *State v. Wiltbank*, 2 Harring. 18; *State v. Walter*, 2 Id. 151; 1 *Perry on Trusts* § 43; *Tucker v. St. Clement's Church*, 3 Sandf. 242; *In re Howe*, 1 Paige 214.

"The amount to which the corporation is entitled is such a sum as will yield, at seven per cent., an amount which, with any income from any other property now owned by the legatee, will give a yearly income of \$2,000, and this can be ascertained by a referee." *Chamberlain v. Chamberlain*, 43 N. Y. 439, 440; *Wetmore v. Parker*, 52 N. Y. 460. Such was the rule followed under the English poor laws, where taking a lease of a tenement of "the yearly value of £10" gained a settlement. 4 *Burns's Justice* 386; *Parish of South Sydlingham and Lamerton*, 1 Str. 57.

The act of 1872 does not at all apply to personal estate, nor does it authorize ecclesiastical corporations to receive lands by devise, or gift, but only by compact, that is by "purchase," using that word in the popular and not in the technical sense. *Jackson v. Hammond*, 2 Cai. Cas. 337; *Ayers v. Methodist Church*, 3 Sandf. 351.

The act of 1872, in express words, or by implication, does not repeal or alter the limitation contained in the 13th section of the act of 1846. The two can stand together

common law, the canon law or by prescription, or in any other manner, except by express statute of Michigan.

In *American Bible Soc. v. Marshall*, 15 Ohio St. 537, a statute of New York, providing that no devise of real estate to a corporation should be valid unless such corporation be expressly authorized by its charter or by statute, to take by devise, was held not to prevent a corporation of New York, not possessing the statutory requisites, from taking lands in Ohio; also, *Thompson v. Swoope*, 24 Pa. St. 474.

In *Vansant v. Roberts*, 3 Md. 119, by the Maryland bill of rights, every devise to or for the support, use or benefit of any minister &c., or any religious sect &c., without leave of the legislature, is void.—Held, not to apply to a bequest of personalty to a Pennsylvania corporation. See, also, *Amer. Tract Soc. v. Purdy*, 3 Houst. 625; *Amer. Bible Soc. v. Noble*, 11 Rich. Eq. 156; *Seaburn v. Seaburn*, 15 Gratt. 423; *Evangelical Ass'n Appeal*, 35 Pa. St. 316; *Silcox v. Harper*, 32 Ga. 640.

In *Rainey v. Laing*, 58 Barb. 453, 489, in a suit by executors, for the construction of a will, in which the heirs at law and next of kin

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and, therefore, there is no repeal of the limitation. *Chamberlain v. Chamberlain*, 43 N. Y. 424, 437.

Having then, as I humbly conceive, established that the trustees named in the will can neither take nor hold the property in question, what consequences ensue? It is said that a trust shall never fail for the want of a trustee, and, to prevent the failure of a trust, the court will appoint a trustee. *Perry on Trusts* §§ 38, 45. But there are exceptions to this rule. There are cases where no trustee, but the one named in the deed or will, *can* execute it. There are cases where the trustees are to act for the donor in exercising a special discretion—as, for instance, selecting and appointing the objects of the donor's bounty and discretionarily apportioning the bounty between the selected beneficiaries. *Fountain v. Ravenal*, 17 How. 369.

Because the trustee cannot *take or hold*, the title is in the heir, and Grover holds but as a trustee for the heir. How can the heir's title be divested? Not by the North Reformed Church, because it has not the power or capacity to *take or hold*. There is no way except at the suit of the supposed *cestuis que trust*, or some of them. But, as we shall hereafter see, they cannot be ascertained, or, if they can, they have no power or capacity to take. *Beekman v. Boncer*, 23 N. Y. 298, 311; *Gower v. Mainwaring*, 2 Ves. 87, 110; *Widmore v. Woodruff*, Amb. 636; *Brown v. Higgs*,

claimed that the gifts to a corporation were void, because such gifts exceeded the capacity of the corporation to take, it was held that that question could not be raised in such a suit, but only in a direct proceeding by the state.

Although a charter cannot be attacked collaterally (*Ref. Pres. Church of N. Y.*, 7 How. Pr. 474), and only directly by the state (*Runyan v. Coster*, 14 Pet. 122; *Banks v. Poitiaux*, 3 Rand. 136; *Baird v. Bank of Washington*, 11 Serg. & Rawle 411; *Goundie v. Northampton Co.*, 7 Pa. St. 233; *Wade v. Amer. Col. Soc.*, 7 Sm. & Marsh. 665; *Chambers v. Baptist Soc.*, 1 B. Mon. 216; *Consistory &c. v. Brandon*, 52 Barb. 228), yet heirs, devisees and next of kin have been held competent to question gifts to corporations unable to take and hold them (*State v. Wiltbank*, 2 Harring. 18, 23; *Harris v. Slaughter*, 46 Barb. 470, 2 Abb. Dec. 316; *Trustees v. Dickenson*, 1 Dev. 189; *Barton v. King*, 41 Miss. 288; *Goddard v. Pomeroy*, 36 Barb. 546; *Ayres v. Methodist Church*, 3 Sandf. 351; *Ruth v. Oberbrunner*, 40 Wis. 238).—REP.

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4 Ves. 708, 718, 719; *Hill on Trustees*, 70, 480; *Fower v. Garlike*, 1 Russ. & Myl. 232, 8 L. J. Ch. 66. If they cannot exercise that power, nobody else can, because the *discretion* was intended to be vested in them and in no one else. The power, in its nature, is not delegatable. The will gives no power of substitution, and no power to assign the power of appointment. *Lewin on Trusts*, 266, 267, 290; *Mortimer v. Ireland*, 6 Hare 196.

III. The uses are so indefinite and uncertain that they cannot be enforced, and, hence, are void, and if the defendant corporation has taken, it holds but as a trustee for the heirs at law and next of kin.

The gift is "to the North Reformed Church of Newark, *in trust* that it" (i. e., said church—not the congregation, but the corporation) "may use the same to promote," (1st) "the religious interests of the said church," and (2d) "to aid the missionary, educational and benevolent enterprises to which *the said church* is in the habit of contributing."

Then there are directions: "I direct my trustee and executors to pass over to the officers of the said church," (I assume, as agents of and for the corporation) "all property, either real or personal, remaining after satisfying the above-named bequests." Then, as to the use, after the property is passed over: "It is my wish that the said church officials" (the direction is to officers as officers, and not to individuals, *N. Y. Inst. for Blind v. How*, 10 N. Y. 84; *Bailey v. Onondaga Co. Mut. Ins. Co.*, 6 Hill 476; *Chamberlain v. Chamberlain*, 43 N. Y. 437) "shall use and dispose of the said property" how? (1st) "At such *times* and in such *manner* as *they* shall deem expedient to promote the above-named interests"—but there is a limitation as to time, viz.: (2d) "Not holding the said property, however, unexpended or unappropriated for a longer period of time than ten or fifteen years."

The use secondly declared, is to aid enterprises to which *the said church* has been a contributor.

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Preliminarily, I will remark, that the statute of charitable uses (43 Eliz. ch. 4), if ever adopted in this state, was repealed. *Pat. 1799, p. 436 § 4; R. L. p. 726 § 2.* This latter act was repealed in 1846. *R. S. p. 684, ¶ 102 § 1.* But the effect of that was not to revive the English act. See *Id. p. 710 § 5; Norris v. Thomson, 4 C. E. Gr. 312.*

Independent of that statute, the rule at law and in equity was and is, that a gift or devise for a purpose or object so vague and indefinite that a court of equity could not enforce it, was void. *Morrice v. The Bishop of Durham, 9 Ves. 405; 1 Perry on Trusts § 253; Lily v. Hey, 1 Hare 580; Ommaney v. Butcher, 1 Turn. & Russ. 250; Att'y-Gen. v. Sibthorp, 2 Russ. & Myl. 107.* See illustrating cases stated in *Lewin on Trusts, 169–170*, and in *2 Roper on Legacies, 1237; Harland v. Trigg, 1 Bro. C. C. 142; Meredith v. Henage, 1 Sim. 542; Sale v. Moore, Id. 534; Williams v. Kershaw, 5 Cl. & Fin. 111.*

A gift for purposes of *benevolence* is not a charity, and cannot be executed as such. Where the will is so framed that the trustees, if they see fit, may bestow it all upon purposes which, *in law*, are not charitable, the bequest is wholly void. All benevolent enterprises are not what the law esteems charitable enterprises. *Norris v. Thomson, 4 C. E. Gr. 307; S. C., 5 C. E. Gr. 489, 522; Morrice v. Bishop of Durham, 10 Ves. 521; James v. Allen, 3 Meriv. 17; Ommaney v. Butcher, 1 Turn. & Russ. 260* (there the residue was to be given in private charity); *Vezey v. Jamson, 1 Sim. & Stu. 69; Brown v. Teale, 7 Ves. 50, note; Fowler v. Garlike, 1 Russ. & Myl. 232; Thompson v. Shakespeare, 1 DeG. F. & J. 399; Ellis v. Selby, 7 Sim. 352; Owen v. Missionary Soc., 14 N. Y. 380, 409; Bascom v. Albertson, 34 N. Y. 584.* This overrules *Williams v. Williams, 4 Seld. 525.* The reasoning in *34 N. Y.* seems conclusive, and should be followed in this state. *Rose v. The Rose Benevolent Ass'n, 2 Dwight's Arg't 7, 8; 28 N. Y. 184; 34 N. Y. 590; Wheeler v. Smith, 9 How. (U. S.) 55.*

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The case of the *Att'y-Gen. v. City of London*, 3 Bro. C. C. 171, establishes no contrary rule. There the will directed the residue to be laid out for *charitable* and other pious and good uses—but *recommended* that the greater part should be employed for the advancement of the christian religion among infidels. A part of the fund was transferred by the trustees to the College of William and Mary, in Virginia, that the college *should maintain and educate*, in the christian religion, so many Indian children as the fund would sustain. In 1790, by order, the English court of chancery took away that support, on the ground that since the independence of the United States the court could not control the college. If the Indians had been the *cestuis que trust*, the fund could not have been withdrawn. The testator made no bequest to any mission. Primarily, the Indian children were the beneficiaries of the trustees by the sufferance of the court. This was when they were in a British colony. But this case is instructive and deserves more consideration. It shows that a court of equity cannot and will not execute a charity where the *cestuis que trust* reside in a foreign country, and are citizens of a foreign government. During the course of the argument, Lord Chancellor Thurlow said: "With respect to the college" (William and Mary, in Virginia), "suppose they should misbehave, where is the *scire facias* to be brought?" He decreed that the charity must be applied *de novo*, and that the master must propose a plan for the application of the produce of the estates.

Doe v. Copestake, 6 East 328, shows that in England the gifts in this case would probably be regarded as superstitious and therefore void. *Shelford on Mortmain*, 88-116; *De Themmines v. De Bonneral*, 5 Russ. 288.

Judge Selden, in *Owen v. Missionary Soc.*, 14 N. Y. 387, correctly pointed out that the jurisdiction of the court of chancery in England, in relation to charities, was derived from three sources: First—From its ordinary jurisdiction over trusts. Second—From the prerogative of the crown.

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Third—From the statute of *43 Eliz. ch. 4*. See *Fountain v. Ravenal*, *17 How. 384*.

The second and third of these sources do not exist here. The royal prerogative was not invoked except where the case was not within the law as to ordinary trusts, *i. e.*, where the trust would fail but for the interposition of the royal prerogative. The executive and judicial powers of the British government are united and exclusively vested in the king. By his prerogative, he is the universal occupant, and entitled to

(1) All derelict lands, whether made so by forfeiture, escheat, or otherwise.

(2) To the beds and shores of seas and navigable rivers, and other rights therein.

(3) To swans and royal fishes.

(4) To beacons and light-houses.

(5) To wrecks.

(6) To certain mines and rights of coining money.

(7) To derelict goods, including waifs, estrays and treasure trove, and

(8) To fines and forfeitures.

If those powers of the crown devolved upon the people of this state at the revolution (but most of them were annihilated), they have not been conferred upon this court by the constitution or any statute of this state. This court has only judicial power. *17 How. 391*; *Bac. Abr., Prerogative, D. 5*; *Story's Eq. Plead. § 8*. The preamble of *43 Eliz. ch. 4*, stated that lands &c. "have been heretofore given, limited, appointed and assigned," and the act directed inquiry to be made "of all and singular such giftes, limitations, assignments and appoyntments &c." As shown by Judge Selden, upon the foundation of these two words, "limitations" and "appoyntments," many strange, capricious and arbitrary decisions were made. *14 N. Y., 400-409*. The *cy pres* power, as applied to charity cases in England, has never been exercised in this state. We have none of the commissions, nor other machinery, statutory and prerogative,

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necessary to its exercise. It is not only without precedent, but without warrant or authority here. *Beekman v. Bonsor*, 23 N. Y. 298; *Bascomb v. Alderson*, 34 N. Y. 594; *Phelps v. Pond*, 23 N. Y. 69-77; *Owen v. Missionary &c.*, 14 N. Y. 400; *Fountain v. Ravenal*, 17 How. 369-386, 391, Taney, C. J.; *Wheeler v. Smith*, 9 How. 55

To recapitulate :

1st. The defendant corporation cannot take or hold *sui juris*, nor as trustee, for the uses mentioned in the residuary clause of the will.

2d. The court cannot select the objects of the trust, nor appoint a trustee for that purpose, with power to do it.

3d. The objects of the testatrix's bounty are so indefinite and uncertain that no one can execute the will, and for all these reasons the residuary clause is void, and the property must go to the heirs and next of kin.

Mr. F. T. Frelinghuysen, for respondents.

I. The devise considered as a general or private trust without the aid of the law applicable to trusts to charitable uses.

First—It is claimed the devise fails, because there is no such church as the “North Reformed Church of Newark.” The name by which the corporation is in common parlance known, will be sufficient to sustain the gift or devise. *Provost &c. of Oxford v. Sutton*, 12 Sim. 521. That there is no other corporation of “like name,” or “more nearly answering to the words,” nor a corporation that might in any way be distinguished by the name set out in the will, will be sufficient. *Bradshaw v. Thompson*, 2 You. & Coll. 295; *Wilson v. Squire*, 1 You. & Coll. 654; *Smith v. Bergen*, 5 Jur. (N. S.) 905. A mistake in the name or description of a devisee, will not make void the devise when the intention of the testator is clear, as, when the devisees were called by their popular name, “the South Parish of S.,”

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their legal name being "the First Parish in S." *Inhabitants of First Parish in S. v. Cole*, 3 Pick. 232.

Second—It is claimed that the North Reformed Dutch Church has not the capacity to accept the trust, because, as alleged, it has no power to take or hold property, excepting in a manner and to an amount specified in its charter, and that, as alleged, is only to be "in trust for the use of said congregation," and "to an amount in value not exceeding two thousand dollars a year;" and that, as this trust is not for the use of the congregation, but to promote the religious interests of the church, and to aid the missionary, educational and benevolent enterprises to which the said church is in the habit of contributing, and as the corporation, at the death of the testatrix, held property in excess of the amount limited, it has no capacity to take the trust, and that to take it would be *ultra vires*; that this assumption of the corporation the heirs at law of Mr. Crane can avail themselves of, and that as equity, as claimed, could not appoint a new trustee, for the reason that discretion is reposed by the will in the particular trustee named, that, therefore, the devise is void, and Mrs. Crane died intestate, and her collaterals take the property.

I submit that not one item of the complainant's proposition can be maintained.

1. The ministers, elders and deacons of the North Reformed Dutch Church, have the capacity to accept the trust. *Angell & Ames*, p. 110 ch. 5; *Dyer* 100a pl. 70, cited as good law by Lord Kenyon, 2 T. R. 672; *Society &c. v. Pawlet*, 4 Pet. 480; *Town Conservators v. Ash*, 10 B. & C. 349; *Bridgewater Canal Co. v. Blewett*, Id. 393.

A corporation, too, can, at common law, acquire property by devise. 2 Atk. 37. In the charter of the North Reformed Dutch Church there is no statutory restriction. The statute of mortmain exists in Pennsylvania. 1 Watts 218. It has been discussed whether the statute was in force in other states. *McCartee v. Orphan Asylum Society*, 9 Cow. 452; *Lathrop v. Com. Bank of Sciota*, 8 Dana 119.

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2. Neither is the North Reformed Dutch Church incapacitated from taking or holding the property devised by the will, because it, at the death of the testatrix, held property in trust for the use of the congregation, of more than the yearly value of \$2,000. The money given to aid the missionary, educational and benevolent enterprises, and to promote the religious interests of the congregation, is not "for the use of the congregation" in any sense. It is the very opposite; it is for matters divorced from and superior to the temporalities of the congregation. *Nassau Bank v. Brown*, 3 Stew. 478; *State v. Conkling*, 19 Cal. 501; *Gorham v. Luckett*, 6 B. Mon. 146.

Where the second act *in pari materia* imposes different penalties, it repeals the former by implication. *Sedgwick on Construction*, 100n; *U. S. v. Tyner*, 11 Wall. 38. A statute is impliedly repealed by a subsequent one revising the whole subject matter of the first. *Bartlett v. King*, 12 Mass. 537; *Nichols v. Squier*, 5 Pick. 167; *Commonwealth v. Kelliher*, 12 Allen 480.

But if there is any doubt as to the capacity of the N. R. Dutch Church to take property otherwise than in trust, and for a limited amount, for the congregation, the doubt is removed by the act of April 4th, 1872 (*P. L. 1872 p. 101*). It is a devise of real estate that is here in question.

"To use land does not require the actual personal occupancy thereof by the devisee. Taking the rents and profits and applying them to certain purposes, is *using* the land for that purpose." *U. S. v. Dickson*, 15 Pet. 141.

(a) Of trusts in general it was formerly held that corporations could not be trustees. Such is not now the law. 2 *Kent Com.* 226, says that corporations, on account of the peculiar structure and perpetual succession, seem to be proper and safe depositaries of trusts. *Sonley v. Clock Makers' Co.*, 1 Bro. C. C. 81.

(b) The object of the trust is not foreign, but is germane to the purposes of the corporation.

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3. But the heirs of Mrs. Crane cannot raise the question whether the North Reformed Dutch Church exceeded its powers in accepting the trust. *Vidal v. Girard*, 2 How. 189; *East Archipelago Co. v. Reg.*, 2 E. & B. 875.

The legislature may waive a forfeiture. 15 N. H. 162; 9 Wend. 351. The corporation does not, because its limit is full, cease, *ipso facto*, to be a person capable of receiving more. It has the capacity to receive until the state acts. 5 Duer 676. If the state does not insist on its restrictions, the title of the corporation, by lapse of time, becomes perfect. *Harpending v. Dutch Church*, 16 Pet. 455; *Baker v. Clark Institute*, 110 Mass. 88; Ang. & Ames § 777; 2 Washb. Real Property, (2d ed.) 567. The estate of the corporation in the lands or in the excess is not divested. *Humbert v. Trinity Church*, 24 Wend. 587; *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633; *Harvard College v. Aldermen of Boston*, 104 Mass. 70; *Attorney v. Bowyer*, 3 Ves. 727. Heirs cannot contest the right of a corporation to take property or to execute trusts. *Vidal v. Phila.*, 2 How. 191; *Wade v. American Colonization Society*, 7 Sm. & Marsh. 663.

Third—It is claimed that the uses are so indefinite and uncertain, that they cannot be enforced, and hence are void, and that if the North Reformed Dutch Church has taken, it holds but as a trustee for the heirs at law and next of kin.

I submit that the devise, as a general or private trust, is not uncertain or void.

II. The devise considered as a trust to charitable uses.

(a) The law of charities is in force, in the federal courts of the United States and in New Jersey.

In England, long before 1601, when the statute of charitable uses was enacted (43 Eliz. ch. 4), the court of chancery, under its original jurisdiction over matters of trust and confidence, administered charities. *Vidal v. Girard*, 2 How. 127; *Going v. Emery*, 16 Pick. 107; *Norris v. Thomson*, 4 C. E. Gr. 307; *Hendrickson v. Decow*, Sax. 577; *Att'y-Gen. ex rel. Bailey v. Moore*, 4 C. E. Gr. 503; *Thomson v. Norris*, 5 C. E. Gr. 522.

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(b) That law is such, that if the trust in question be one to charitable uses, the case is relieved from all question as to the capacity of the North Reformed Church to accept the trust. 2 *Story Com.* (2d ed.) 415, §§ 1169, 1170; *Vidal v. Girard*, 4 *Pet.* 179. Even a grant to an unincorporated association, in trust for a charitable purpose, is sustained in equity. The court will appoint a new trustee. *Perry on Trusts* § 46. Also, *Hamblett v. Bennett*, 6 *Allen* 140. Where a literal execution becomes inexpedient or impracticable, the court will execute it as nearly as it can, according to the original purpose, or (as the technical expression is) *cy pres*. *Story Com.* § 1169; *Att'y-Gen. v. Oglander*, 3 *Bro. C. C.* 166; *Att'y-Gen. v. Green*, 2 *Bro. C. C.* 492; *Frier v. Peacock*, *Finch* 245; *Baptist Association v. Hart's ex'rs*, 4 *Wheat.* 1; *Inglis v. Trustees Snug Harbor*, 3 *Pet.* 99. A court of chancery will aid a defective conveyance of legal charitable uses. *In re Christ Church, Cambridge*, 1 *W. Bl.* 90.

(c) The trust in question is one to charitable uses.

The case of *Thomson's ex'rs v. Norris* is relied on as authority against the validity of the devise in question. Chancellor Zabriskie's opinion is found in 4 *C. E. Gr.* 308, and the opinion of this court in 5 *C. E. Gr.* 521. The case was this: Mr. Thomson's will declared, as to certain accumulated income of the estate, that the testator's widow "shall be authorized and empowered by her last will and testament to give and devise the same among such benevolent, religious or charitable institutions as she may think proper." There was a considerable accumulation of income, and the widow and the brother and three sisters of the testator concluded that, because the widow might give the fund to a benevolent institution which was not a charitable institution, if one could have been found, the devise was not legal; and that, to avoid this illegality, she would take two-thirds of the fund, and the brother and sisters would take the other third, and an agreement was made between them to that effect. The legislature being the sovereign guardian of public charities thereto empowered, passed an act approving and confirming this agreement, and the suit

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was brought that the executors might have a judicial sanction for giving up the fund. If the legislature had authority to pass the act, there was really no question before the court, and even if the legislature had not authority to settle the question, the court would be inclined to favor a family settlement that had commended itself to a co-ordinate branch of the government. Many of the cases cited by Chancellor Zabriskie fall short of sustaining his decision. Thus, in *Morrice v. Bishop of Durham*, 9 Ves. 404, the trust was "for such objects of benevolence and liberality as the bishop, in his own discretion, shall most approve." In *James v. Allen*, 3 Mer. 17, the trust was "for such benevolent purposes as the trustees might agree upon." In *Ellis v. Selby*, 7 Sim. 352, the trust was to charitable or other purposes. In *Kendall v. Grange*, 5 Beav. 300, the trust was for the relief of domestic distress, assisting indigent but deserving persons (Lord Langdale, master of the rolls, says that, if the sentence had ended here, I should have held it a good charity, but the testator says further), or to encourage undertakings of general utility. In *Vezey v. Jamson*, 1 Sim. & Stu. 69, the trust was for charitable or public uses or otherwise.

This court relies much upon the case of *Williams v. Kershaw*, 5 Cl. & Fin. 111, where the trust was for "such benevolent, charitable and religious purposes &c." The master of the rolls first made "and" to mean "or," then held that, as the trustees might devote the fund to benevolent purposes which were not charitable, therefore the trust was void. 2 *Boyle on Charities* 281, ch. 5.

In the case of *Thomson v. Norris*, the word "institutions" seems to strengthen the position that the trust was one to charitable uses—the words are "benevolent, religious or charitable institutions." I can conceive of no benevolent institution that could have been in the mind of the testator that was not also a charitable institution. The court refers to the case of *Babb v. Reed*, 5 Rawle 151, as an instance of a benevolent institution which was not an association for

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charitable uses. That association being in debt, claimed the benefit of the law of charitable uses to make it a *quasi*-corporation, so as to give relief from personal liability; the court said it was an association restricted to the mutual aid of a few, and not for the relief, in any shape, of the community; that it was an associating together as partners, the same as individuals associate for the purposes of banking, and that they were not entitled to the benefit of the law of charitable uses, but were jointly and severally liable. It was no more a benevolent than it was a charitable institution, and no more either than is the Newark Mutual Benefit Life Insurance Company.

This case is very different from *Thomson v. Norris*. The trust is "to promote the religious interests of the church, and to aid the missionary, educational and benevolent enterprises to which the said church is in the habit of contributing." Gifts for the advancement, spread and learning of christianity, or for the support of worship, have, ever since the statute of 43 Eliz., been held charitable. *Jackson v. Phillips*, 14 Allen 552. So, to promote the religious interests of said church, is a charitable use. A trust in aid of foreign missions is a charitable use. *Bartlett v. King*, 12 Mass. 537; *Fairbanks v. Lawson*, 99 Mass. 533.

The counsel of complainants states that foreign missions are not within the letter or the spirit of the statute of 43 Eliz., and refers us to 2 Story Com. § 1164, which reads thus: "But there are certain uses which, though not within the letter, are yet deemed charitable within the equity of the statute. Such is money given to maintain a preaching minister; to maintain a school-master in a parish." For educational purposes is a charitable use. *Swasey v. Am. Bible Soc.* 57 Me. 527; *Tainter v. Clark*, 5 Allen 66. For benevolent purposes, is a charitable use. *Saltonstall v. Saunders*, 11 Allen 468; *Shaw v. Wilson*, 9 Cl. & Fin. 355, at page 390, refers to *Att'y-Gen. v. Pierson*, 3 Mer. 353; *Craigallie v. Aikman*, 1 Dow 1. When the trustee or *cestui que trust* is uncertain, or if the trust is in doubtful

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words, the court will have recourse to extrinsic circumstances. *9 Cl. & Fin.* 355, 383.

Again, the character of the devisee indicates the character of the devise. *Magill v. Brown, Bright.* 437; *Bice v. Maxwell*, 28 Pa. St. 23.

The case at bar is this: A member of a christian church devises to it property to be used to promote the religious interests of the said church, and to aid its missionary, educational and benevolent enterprises. I submit that each of these is a charitable purpose; that a "benevolent" purpose, to be effectuated by a christian church as trustees, is held to be a "charitable purpose," and the word "benevolent," when associated with the words "educational and missionary," is to be rendered, as they are, as meaning "charitable," which is one of its true significations; and further, when you add to the words "missionary, educational and benevolent enterprises" the words "to which the said church is in the habit of contributing," and those enterprises are charitable, that the trust is a trust in behalf of charities, and cannot be declared void.

The opinion of the court was delivered by

BEASLEY, C. J.

In this case, there are but two objections to the effectuation of that clause in this will which is contested, that seem to me to require discussion. The first of these raises the question, whether or not this religious corporation, the North Reformed Dutch Church of Newark, can legally take the testamentary donation in question, in view of the restrictions contained in the law creating it; and the second is, whether this testamentary provision creates a valid charitable use?

With respect to the first point: The contention of the counsel of the appellants, on this branch of the case, is, that this corporation cannot take the benefit of this trust without violating a restrictive provision of its own charter. The fol-

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lowing are the circumstances relied on to justify this conclusion: The North Reformed Dutch Church of Newark was organized by force of the act entitled "An act to incorporate trustees of religious societies," passed April 17th, 1846 (*Nix. Dig.* 802), which, in section 11, constitutes the minister, elders and deacons of every Reformed Dutch congregation trustees of the same, and a body politic and corporate in law; and, in section 13, enables such trustees to acquire, purchase, receive, have and hold any lands, tenements, hereditaments, legacies, donations, moneys, goods and chattels, in trust, for the use of the said congregation, to any amount in value not exceeding \$2,000 a year &c.

At the time this will went into operation, this church, it is admitted, was possessed of its complement of property which this law authorized, for such property was in value at least \$2,000 a year.

From these facts it is urged that, as the testamentary clause in question empowered the trustees, in their discretion, to use the fund bequeathed, to promote the religious interests of the church, it was, in substance and effect, an illegal addition to their property, so that, if the trust was effectuated, the statute would be violated. It will be observed, that the first power that the will gives over the trust fund is, that the trustees of the church "may use the same to promote the religious interests of the said church," and it is insisted that, by force of such provision, they may, if they see fit, apply the whole fund to the same uses to which they devote the property they are authorized by law to hold. It is said, they may devote this fund to the support of their minister, or to any of the other ordinary expenses of the establishment, and that such an appropriation will be plainly a compliance with the limitations of the will.

In order to treat this argument with fairness and to give its full force, it should be remembered that these proprietary restrictions imposed by this law upon these religious corporations, had a meaning of their own, and were evi-

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dently political in their character. They are the latest manifestations of that dread of property being held in mortmain, and that jealousy of ecclesiastical encroachment and monopoly, which so perseveringly has exhibited itself in English and American legislation. At all events, it is clear that it was a part of the legislative policy of this state that this class of corporations should not be the possessors of property beyond the fixed measure. The force of the argument, therefore, that we are now considering, lies in the circumstance that, assuming these to be the only facts in the case, to permit this trust to be executed is to permit this policy to be infringed. It is certainly no answer to this view to say, that if this church has not capacity to receive and execute this trust, that the bequest, being a charity, does not fail, but, in such event, the court will appoint another trustee to support and execute it. Such an answer seems to me to be founded on a misapprehension of the point of the objection, which is not that the trustee is too feeble to hold the trust, but that the purpose of the trust is illegal. When the object of a trust is to violate the policy of the law, a court of equity, in a case proper for its action, will not permit it to be executed by any hand whatever.

Nor can I assent to the other proposition, that if, as the contention assumes, this bequest is violative of the law if carried into effect, that none but the state can intervene. I find no warrant for such a doctrine, either in the legal principles belonging to the subject or in the adjudications. There can be no doubt that there are cases in which, when a corporation has acquired rights of property to an extent or in a manner unwarranted by its charter, no one but the public can have the right to complain. A grantor making title to a corporation might be estopped from questioning the effect of his own conveyance. So, a mere stranger could not question such a corporate title. But I have not observed any decision that asserts, when a title is created by devise which vests in a corporation, for its own use, a larger quantity of property than the laws authorize, that the heir at law has no

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right to make objection. The authorities referred to do not lend countenance to such a doctrine. Thus, in the case of *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633, a stranger attempted to attack the title of the corporation on the ground of a usurpation by such corporation; and *Runyan v. Coster's lessees* was a case following the case of *Leazre v. Hillegas*, 7 Serg. & Rawle 313, in which the question was, whether a corporation taking a title in a manner repugnant to the limitations of its charter, could pass a legal title to its grantee, and it was held that it could do so, subject to the right of the state to avoid such an estate.

These cases rest on the obvious principle that the capacity of the corporate body to become the grantee in the given case, cannot be challenged by a party who does not stand in a position to raise the question. In such a position, it would be true that the state alone could object to such corporate act. But such instances are to be discriminated from that other class, where the corporation claims to take and hold by devise, in contravention of law, and the heir of the deviser is the party complaining. In this latter situation, the doctrine enforced in the cases cited does not apply. In this connection, the case of *Miller v. Lerch*, 1 Wall. Jr. 210, is apposite. The facts of that case were essentially similar to those now under judgment, so far as relates to this particular point; there was a devise of an estate of over \$300,000 to two church corporations which had been created under a statute giving to each the right to receive and hold property, provided it did not exceed the clear yearly value or income of \$2,000; the heir at law brought ejectment, and was defeated, on the ground that, by force of certain statutes of that state, the title at law passed to the corporations, but, so far was Mr. Justice Grier (who presided) from asserting that the heir at law had not the right to draw the title in question, that he said: "The remedy, therefore, of the plaintiff should be by a bill in equity, and not by ejectment. If, on the hearing of the cause in equity, the court should be of opinion that the trusts limited in this

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devise are such as the chancellor could not execute, it will treat the devisees as trustees of the heirs at law or next of kin, and decree a conveyance of the legal estate to them." The distinction is, that when the trust itself is unexceptionable, the legal incapacity of the designated trustee to hold and execute the trust, will afford no ground for declaring the limitation void, but will lead merely to the substitution of a proper trustee, by the court having the appropriate jurisdiction. But when the complaint is made by the heir at law, before the proper tribunal, that the devise is illegal in its nature, and cannot be lawfully executed by any trustee, I think no well-considered case can be found denying his right to raise up the dispute touching such devise. Indeed, this was, in truth, the attitude of the heirs at law in the great controversy relating to the Girard will; their position being, that the testamentary dispositions then drawn in question, were opposed to certain essential principles of state policy, and, on that account, were void; and no one questioned their right to intervene, or pretended that, on such an issue, the public alone could challenge the title of the city. Mr. Perry, in his well-digested work on Trusts (*Vol. 1 § 160*), correctly lays down the legal principle on this subject. He says, that where a gift is made upon trusts that are void, in whole or in part, for illegality, a trust will result to the donor, his heirs or legal representatives, and, as illustrations from adjudged cases, he instances the example of a trust which is void by statute, as a disposition in favor of persons or objects prohibited from taking, or where the gift contravenes some policy of the law, as tending to a perpetuity. The recent case of *Luckraft v. Pridham*, *L. R. (6 Ch. Div.) 205*, is illustrative of the same principle, and *Bridges v. Pleasants*, *4 Ired. Eq. 26*, may be specially referred to in this connection.

I have already said that, in the present case, the gist of the objection is, not that this corporation cannot take and hold against the objections of any one but the state, even if, in so doing, it transcends its legal capacity, but that this



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testamentary disposition itself is illegal, and can not be executed lawfully by any trustee whatever, being opposed to a principle of civil policy established by legislation. I have no doubt that the heir at law has a standing in court to raise such a contention, and that, in a court of equity, he would be entitled to prevail if he could succeed in establishing the proposition on which such defence rests.

But I have concluded that there is another element in this case, that strips the foregoing contention of all its legal force, and that is, that by the act of 1872 (*Rev. p. 959, § 8*), the capacity of this corporation to acquire property is greatly enlarged, and, in one direction, is made unlimited. The act referred to, and which was in force when the testatrix died, declares that "it shall be lawful for any religious society in this state, however incorporated, to purchase and hold, and also to convey and dispose of, any real estate which they may deem necessary and expedient; provided that the same shall not be used by the religious corporation acquiring the same, for any other purpose than the rendering and maintaining, in any building now or hereafter erected upon such real estate, the worship of Almighty God, and the furtherance of religion according to the tenets and forms of worship of the religious denomination to which such religious society belongs, or for the education or the administration of charity to the bodies or souls of men."

Here, it will be perceived, is a plain grant of authority given to these corporations to purchase and hold all such land as they may deem expedient, as the sites of buildings, to be devoted to the specified uses. There is no restriction on the quantity or value of lands that may be so purchased and held, and the consequence is, that the receptivity of the corporation, with respect to property, is practically unrestricted, provided, in the limitation of such property to such corporation, it is not specially appropriated to purposes other than those designated in the statute. Thus, therefore, if a gift should be made to one of these corporations having its complement of property to the annual value of

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\$2,000, of the further sum of \$5,000 to be employed for the support of the minister, such a gift would be in contravention of the laws above referred to, because this addition to the corporate funds could be used only for the purpose specified, and such purpose is not one of the uses designated in the act of 1872. But if such gift should be bestowed in general terms for the uses of such corporation, then it is plain such gift is not inconsistent with any of the provisions of these statutes, inasmuch as such gift may be devoted to a use sanctioned by them.

The rule I consider quite unquestionable, that whenever there is a corporate capacity to receive donations for particular uses, a donation in general terms to such corporation will be valid, as the law will infer that the purpose of the donor was lawful, and that it was his intention that his gift should be appropriated to some of the legitimate uses. In the present case, these trustees can, by force of the legislation just recited, lawfully apply this whole fund in the purchase of a site of a church school-house, and such use of the trust moneys would be within both the statutory and the testamentary limitations. Such being the case, it is plain that such gift cannot be said to be in violation of such statute. I can, therefore, perceive nothing illegal in the first clause of this trust that authorizes these trustees to use this fund, if they see fit so to do, "to promote the religious interests of the said church."

It remains to consider the second objection: It will be remembered that the limitation is to use the fund "to promote the religious interests of the said church, and to aid the missionary, educational and benevolent enterprises to which the said church is in the habit of contributing," and it is urged, that this entire trust cannot be said to be charitable, within the legal signification of that term, inasmuch as the word "benevolent," by its natural force, takes in objects and purposes that are not charities. That this term has this latitudinarian meaning, was, upon full consideration, decided by this court in the case of *Norris v. Thomson's ex'rs*, 5 C. E.

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Gr. 489. That exposition went on the ground of the intrinsic meaning, and the unchecked form, of the term, for on that occasion it was considered that there was nothing present tending to hem in or narrow its import. As the word "benevolent" is admittedly broader in its meaning than the word "charitable" in its technical sense, I am unable to comprehend how the decision in question could have been other than it is, unless upon the inadmissible assumption that, when there is no guide to the testator's intention but his language, the court is possessed of the arbitrary power of altering such language. It will be found, I think, in almost all the decisions, that when these expressions have been taken in any sense but the technical or popular sense respectively, there has been something in the context justifying the particular interpretation.

I do not think much of precedents in such a matter, for in the multitude of cases that, in a general way, illustrate the subject, scarcely two can be found that are identical in circumstance and expression, and unless two cases are identical in such particulars, the one can have but little bearing on the other in point of authority. The general rules of construction appear to me to be the best criteria on these occasions, and one of the most important of such rules is that, when the terms of such a limitation as this, in view of the whole instrument, have a clear meaning, judicial astuteness, employed either to uphold or suppress the instrument, is quite out of place. In the absence of any criterion but the naked signification of the terms themselves, a court, in my opinion, can no more say that benevolence has the import of charity, and nothing more, because in some of their senses the two words assimilate, than it would be legitimate to adjudge that the number five means four because the two numbers are but a single remove from each other. Nor can I go with that process of reasoning that concludes that when the word "benevolent" is conjoined to the word "charitable," the two words become identical in meaning, as that implies that one of the terms is to be dispensed with, or

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that the lesser term swallows up the larger one. The fact is, in such connection, there is nothing incongruous, nor is there even a shade of uncertainty in the meaning of the words; and, in such a naked case as I have supposed, for the court to strike out the broader of the descriptive terms, may indeed uphold, now and then, a testamentary limitation, but at the same time one of the most important canons that the law has established for the construction of written instruments, is impaired. But, as I regard this point as entirely settled by the decision of this court in the case just noticed, I shall not further pursue the subject.

But accepting in its full force, as I do, this principle of construction, I have altogether failed to see how it is to be applied so as to make it of much importance in the present case. In this will, the words in question do not depend on their intrinsic qualities alone for their signification. The facts shown, clearly demonstrate the sense in which the testatrix used these terms. It does not seem to me that the matter has been left in the least uncertainty. It appears in the case, by the proofs, that this church has been in the habit of making donations to certain enterprises and objects, such as the foreign and domestic missions, the bible society &c., all of which enterprises are charities in the legal sense of the term. When, therefore, this will declares the trust, and directs the property to be used "to aid the missionary, educational and benevolent enterprises to which the *said church is in the habit of contributing*," the will itself provides a standard by which the word "benevolent" is to be measured. The fund is not to be used to aid any benevolent enterprise, but only benevolent enterprises of a certain defined character, and they are charities. The word "benevolent" is thus, by the context and the subject matter, cut down into legal dimensions. From the first, I have seen no difficulty on this point.

I shall vote to affirm the decree.

Decree unanimously affirmed.

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PHILIP HASTON and others, appellants,

v.

MICHAEL CASTNER and others, respondents.

1. Debts being liens, by force of the statute, on the lands of a deceased debtor, a creditor at large, whose claim has been admitted by the executor, has a standing to file a creditor's bill to set aside conveyances alleged to have been made by the deceased in fraud of creditors.

2. *Query*, Whether the executor could take such proceedings.

3. A voluntary conveyance is void by force of the statute relating to frauds and perjuries, with respect to debts existing at the date of such conveyance.

4. If a consideration has been given on such conveyance, the question then is, whether the purpose was fraudulent.

5. In this case, the conveyances—*Held*, valid, on the ground that they were not voluntary, but for a consideration, and no fraud shown.

Suit in equity by several creditors of Moore Castner, deceased, against his sons Michael and Nathan Castner, for the purpose of charging two farms, situate in Hunterdon county, which the deceased conveyed to them respectively, with so much of the debts of the complainants as have not been paid by the administrator. It appeared that the estate of Moore Castner was insolvent, and had been settled.

On appeal from a decree of the chancellor, reported in *Haston v. Castner*, 2 Stew. 536.

Mr. J. T. Bird, for appellants.

Mr. J. N. Voorhees, for respondents.

The opinion of the court was delivered by

BEASLEY, C. J.

This is a creditor's bill seeking to charge certain lands with the debts of a deceased grantor, on the ground that the conveyances which he made of such lands to his sons, were in fraud of creditors. As the complainants are simply

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creditors at large, not having put their claims in the form of a judgment, the first question to be disposed of is, whether they have any standing in equity that will justify the exhibition of this bill.

It cannot be denied that, in this state, the general rule is entirely settled that, in order to enable a creditor to challenge, on the ground of fraud, a transfer of property made by his debtor, such creditor must have first obtained a judgment or some other lien upon the property. There is quite an array of decisions to this effect, and, upon an examination of these cases, it will be found that the reason given in them why the general creditor is excluded from such a course of relief is, that his debt, until entered of record, is no charge or lien on the property alleged to have been illegally transferred. In *Oakley v. Pound*, 1 *McCart*. 178, the chancellor expressly states this to be the principle on which equity proceeds in this department, and the same ground for equitable action is assigned in the case of *Swayze v. Swayze*, 1 *Stock*. 273. This latter judgment, with respect to the reason on which it rests, being approved of by this court in *Tantum v. Green*, 6 *C. E. Gr.* 364. All the adjudication in this field will be readily found by referring to 1 *Stew. Dig.* 381, *Equity II* (g).

Under the pressure of these authorities, this bill must give way, unless these claims, or some of them, can be said to constitute liens upon these lands. In the court of chancery, the wide rule, taken from *Loomis v. Tift*, 16 *Barb.* 541, appears to have been adopted, that if there has been a putting away of lands out of the reach of creditors, that, as equity has jurisdiction in case of frauds, relief will be afforded to this class of creditors, irrespective of the circumstance whether they have a lien on the land or not. But this is plainly a departure from the principle of all the decisions just referred to, in which, in this class of circumstances, the foundation of equitable intervention is expressly based on the existence of the creditor's lien on the property. Nor do I think the modern English cases can be said to lay

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down a different rule. None of the cases cited in the court below appear to warrant such a conclusion. *Richardson v. Smallwood*, 1 Jac. 552, is a proceeding founded on a judgment, as is, likewise, the *Reese River Silver Mining Co. v. Atwell*, L. R. (7 Eq.) 346.

In *Sharp v. Soulby*, 1 McN. & G. 346, a bill, in the usual order, was exhibited for the administration of the estate in equity by a creditor at large, and, after a decree to account had been made, and the complainant's claim had been thus accredited, he filed a supplemental bill, in augmentation of the assets, to set aside a fraudulent settlement. The last case cited, *Phelps v. Platt*, 50 Barb. 430, is a proceeding having a judgment for a foundation. But whatever may be thought of these cases, as has already been intimated, the rule upon this subject has been too long established in this state to be disturbed, to the effect that, when the pursuit is of legal assets, in contradistinction to equitable assets, there must be a lien on such assets to give a complainant a standing in a court of equity.

But, although I entertain this view, I still think this bill sustainable, and I put that conclusion on the ground that the complainant's claim is a lien on these lands, if his contention that they have been conveyed in fraud of creditors, is assumed to be true. It seems to me, that the statute subjecting the lands of a decedent to his debts, imposes them as a legal burthen upon such lands. By the act (*Rev. p. 766, § 70*), the lands of "any person who shall die seized thereof, or entitled to the same," shall be and remain liable for the payment of his or her debts for one year after his or her decease, and may be sold by virtue of an order of the orphans court. Although the liability to debts is, in this clause, in terms limited to a year, still it has always been held that, until a *bona fide* sale has been made by the heir or devisee, the lien continues; and this situation is plainly recognized in the seventy-seventh section of the same act, which defines what the effect of the deed given under the order of the orphans court shall be, and which, in that respect, provides that such

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conveyance shall vest in the purchaser or purchasers all the estate that the testator or intestate was seized of at the time of his or her death, if the order be obtained within one year thereafter; and, if the said order be not obtained within that time, then the said conveyance shall vest in the purchaser or purchasers, all the estate that the heirs or devisees of the testator or intestate were seized of at the time of the making of the said order of the orphans court; and that the lien upon the lands remains until the heir or devisee has actually conveyed the property, has been judicially declared on several occasions. *Parret v. Van Winkle*, cited in *Warren v. Hunt*, 6 Hal. 9.

The act in question, it will be observed, makes debts a burthen on the lands of the decedent of which he "shall be seized;" consequently, when lands are attempted to be conveyed in fraud of creditors, as the statute against frauds and perjuries makes such conveyance absolutely void, such conveyance cannot disturb the seizin of the decedent in such lands, so far as relates to the creditors so injured. With regard to his creditors, the debtor, in contemplation of law, dies seized of the lands, notwithstanding such fraudulent alienation, and, in my judgment, therefore, a creditor under such circumstances, has his claim fastened upon the land of his debtor, and such lien will give him, within the rule established by the decisions, the footing requisite to maintain himself in a court of equity. It has several times been held that the lien obtained on lands under the attachment act affords such footing, and no reason seems to exist why such statutory right of the creditor in the lands of his deceased debtor, should not have an equivalent in the case of a living debtor.

Nor do I think it requisite for the creditor, before obtaining his equitable remedy, to obtain a judgment against the administrator. Formerly, under the statutes of this State, such judgment would have bound the lands of the debtor, but such is not now any part of its office, and, therefore, as to this real estate sought to be subjected to the payment of debts, such a proceeding would be wholly in-

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Neither, in this case, can such a step be called for in order to manifest, in a conclusive form, the fact of the existence of the amount of the debt, for it has been presented, according to the statutory regulation, to the administrator, under oath, and part of it has been paid by him, so that it is as conclusively established, in a legal mode, as though its validity had been passed upon by a court.

With respect to the objection that, in these cases of conveyances by a deceased debtor in fraud of creditors, the remedy should be sought by the administrator, and not by the individual creditor, the answer is two-fold. First, if the capacity of the administrator be admitted, in the present case, the bill shows that he has been applied to, and has virtually refused to proceed, and this would clearly give the complainant a standing to pursue this remedy in his own behalf. It was, in principle, so held in the case of the *President, Managers &c. v. Trenton City Bridge*, 2 Beas. 46, as will appear by an examination of the bill. But, in the second place, it is obvious that, in many cases, perhaps in most, there would be serious difficulties in the way of a procedure of this nature being instituted in the name of the personal representative, because conveyances of this character depend very often for their effect on the relations of the debtor towards particular creditors, so that, while they may be void as to some of such creditors, they may be valid as to others. Suggesting, therefore, these embarrassments, but without concluding that the personal representative may not take proceedings of this kind, after having obtained, in the orphans court, an order for the sale of the lands of the debtor, it is sufficient now to say that it is a convenient practice, and is not open to legal objection, for the individual creditor, for his own benefit, and in behalf of others similarly situated, to institute these suits. Consequently, I think the bill should be retained, and the case decided upon its merits.

Connected with these events, there is a principle of law which it is of some importance should be carefully settled

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by this court. I refer to the rule with respect to the effect of a voluntary conveyance on existing debts. To the principle adopted in this case in the court below, I cannot subscribe. That principle is this: Speaking of these deeds in controversy, made by Moore Castner, the chancellor says: "If he had available assets sufficient to answer all his pecuniary obligations, over and above the property conveyed to them, the conveyances are valid against their existing creditors, even though the conveyances were wholly voluntary." Now, I am constrained to dissent altogether from that doctrine, for the rule that a voluntary conveyance can be avoided by creditors whose debts exist at the date of such conveyance, and that, too, without reference to the pecuniary condition of the debtor, is a doctrine having such a weight of adjudication in this state, in its favor, that it seems to me that it ought to be considered as definitively settled. So far as my experience extends, it has always been so ruled in trials at the circuits. Nor is the principle of recent origin in our courts, for it was recognized in judgment, and put in force, as long ago as the time of Chief-Justice Kinsey. The first mention of the subject in our reports, is to be found in the case of *Den v. De Hart*, decided in the year 1798, and reported in *1 Hal. 450*. That case presented an instance of a voluntary conveyance from a father to his children, made upon no other consideration than natural affection, and the question was whether such deed was good under the statute against frauds and perjuries, with respect to a person having a cause of action against such father at the date of the conveyance. At the trial it was left to the jury to say if the transaction was fair and *bona fide*, or whether its object was fraudulent to prevent those who had claims against the grantor from obtaining justice; but the jury having found against the honesty of the affair, on a motion for a new trial, Chief-Justice Kinsey cited, with approbation, the remarks of Lord Hardwicke, in the two leading cases of *Russell v. Hammond*, *1 Atk. 13*, and *Townsend v. Windham*, *2 Ves. 10*, and quotes

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from the latter of these cases the following sentences: "There is *no case* where a person indebted makes a voluntary conveyance of a real or chattel interest for the benefit of a child, without the consideration of marriage or other valuable consideration, and dying afterwards indebted, that that shall take place." "I know no case on the *13 Elizabeth*, when a man indebted at the time makes a mere voluntary conveyance to a child, without consideration, and dies indebted, but that it shall be considered as part of his estate, for the benefit of his creditors." The chief-justice then says that those cases fully establish the point that a voluntary deed made when the grantor is indebted, is invalid against *such creditors*, and that this doctrine is recognized by numerous authorities, sanctioned by the ablest judges, and questioned by none.


A short time after this decision, in the year 1798, at a trial at *Nisi Prius*, in the case of *Den v. Lippincott*, reported also in *1 Hal. 473*, the principle thus announced and vindicated was practically enforced by the same learned judge. Then, after another interval of about twenty years, the same question arose in the court of chancery of New York, in the case of *Reade v. Livingston*, *3 Johns. Ch. 481*, leading to the production, by Chancellor Kent, of his celebrated opinion, which comprises all the learning on the subject then extant, and which has had so much to do with the shaping of judicial opinion on this topic in this country. After a thorough review of all the cases, the chancellor comes to this result: He says: "The conclusion to be drawn from the cases is, that if the party be indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such debts, and no circumstance will permit those debts to be affected by the settlement, or repel the legal presumption of fraud. The presumption of law in this case does not depend upon the amount of the debts, or the extent of the property in settlement, or the circumstances of the party. There is no such line of distinction set up or traced in any of the cases. The attempt

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would be embarrassing, if not dangerous, to the rights of the creditor, and prove an inlet to fraud. The law has, therefore, wisely disabled the debtor from making any voluntary settlement of his estate to stand in the way of his existing debts."

From this citation it will be observed that the case of *Reade v. Livingston*, and the cases decided by Chief-Justice Kinsey, are in exact agreement, and enunciate precisely the same legal principle. And the same rule has since received judicial sanction in our own courts. In *Satterthwaite v. Embly*, 3 Gr. Ch. 489, a voluntary settlement made by a husband, after marriage, in favor of his wife, was declared void as against the creditors of the husband, whose debts were in existence at the date of such deed. And nowhere do we find the existence of this rule more directly approved of than it was in the case of *Cook v. Johnston*, 1 Beas. 51, by Chancellor Williamson, for he says: "Although there is some conflict of authority, I think the principle is correctly laid down by Chancellor Kent, in *Reade v. Livingston*, that if the party is indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such debts (that is, those antecedently due), and no circumstance will permit those debts to be affected by the settlement, and repel the legal presumption of fraud." In *Beeckman v. Montgomery*, 1 McCart. 106, Chancellor Green has left upon record his approval of the same doctrine.

This train of authorities, extending over so large a part of our judicial records, should have the effect, as it seems to me, of completely settling the rule of law in this state. These cases do not appear to have been within the attention of the chancellor when he adopted the opposite principle as his rule of judgment: but, as that rule of decision was in direct opposition to these adjudications, it became necessary in this court to restate the correct doctrine on the subject. It may be well, also, to remark that, by consulting 1 Am. Lead. Cas., under the title of Voluntary Conveyance, it will abundantly appear that the doctrine so elaborately vin-



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dictated in *Reade v. Livingston*, has been accepted very generally by the courts of this country, and that, with this view, the well-considered opinion of Lord Westbury, in the late case of *Spirett v. Willows*, 3 DeG. J. & S. 302, is in all respects conformable.

The result is that, entertaining these views, it does not seem to me that the present case can be disposed of by means of the rule adopted in the court below; but, notwithstanding this conviction, I have not, upon the merits, been led to a result in anywise different from that to which the chancellor arrived. The considerations so prevailing with me, are these: The conveyances from Moore Castner to his sons were not gratuities, not voluntary transfers of property, but a consideration was paid for them. This fact I regard as being satisfactorily substantiated, and, this being so, the transaction, in a legal point of view, has no affinity to the doctrine just discussed. When the conveyance is not voluntary, but is upon a consideration, then the rule is, that, in order to overthrow it, a fraudulent intent must be made to appear, just as it must be when the debts sought to be enforced have been contracted subsequently to the conveyance; and it seems to me that, in the present instance, so far from an intended fraud being made to appear by the proofs, such an idea is utterly exploded by the admitted circumstances. This affair was not transacted in the dark, but in open daylight; the deeds were drawn by a scrivener of the neighborhood; the father, on several occasions, spoke to his neighbors about the matter, and directed the taxes to be assessed to his sons; the deeds were recorded, and the sons lived upon their respective properties, improving them and repairing the buildings; the father, at the time of the conveyance, was not insolvent, but had ample means for the payment of his debts, and was, therefore, under no influence leading him to put the property out of his hands for any illegal purpose, and the circumstance that the farms were put to his children at a considerable under-valuation, was, under the circumstances, not unnatural, and cannot be

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a fact of much importance in a transaction attended with so many indications of an honest purpose. On the ground, therefore, that these conveyances were made on a valuable consideration, and that no fraud has been shown, I think the transaction should be allowed to stand, and shall accordingly vote to affirm this decree.

Decree unanimously affirmed.

**THE LEHIGH VALLEY RAILROAD COMPANY and THE MORRIS
CANAL AND BANKING COMPANY**

v.

HENRY MCFARLAN and others.

1. The charter of the Morris Canal and Banking Company was granted in 1824. By the constitution of this state, in existence at that time, it was competent for the legislature to authorize the taking of the property of private individuals for public uses, without compensation first made.

2. The charter of the company is irrepealable, and created a contract which is incapable of alteration or repeal by the legislature, except by mutual consent, and is, therefore, unaffected by the constitution of 1844, which forbids the taking of property by private corporations for public use, without compensation first made. The company's charter, and the powers and privileges therein granted, continue, notwithstanding the change of policy adopted by the constitution of 1844, and possess equal vitality with respect to acts done by the company under it, after the constitution of 1844 became the fundamental law, as if done before the adoption of that instrument.

3. A state constitution is a law within the meaning of that clause of the constitution of the United States which ordains that "no state shall pass any law impairing the obligation of contracts."

4. By its charter it is made lawful for the company to enter upon, take possession of, and use such lands, waters and streams as are necessary for its canal, without compensation first made. The title to lands taken, and the right to waters and streams appropriated, do not finally vest in the company until compensation be made; but, nevertheless, the occupation and use thereof, by the company, are made lawful, though compensation therefor has not been ascertained or paid.

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5. The twentieth section of the company's charter, construed in connection with the twenty-seventh section, gives to persons injured a right of action against the company for damages to water rights as well as to lands, tenements and hereditaments, whether the damages sustained be direct or consequential, and whether they arose from the construction of the canal in the first instance, or from the subsequent operations of the company.

6. The only redress for the owner of lands or water rights, which are taken or injuriously affected by the construction or operation of the canal without compensation having been made, is by action for damages. He cannot remove the company from the premises by ejectment, or abate the company's works as a nuisance, though compensation has not been made for his injuries.

7. The Morris canal enters into and crosses the Rockaway river at Dover. The crossing is effected by means of a dam in the river, which holds the water, at the place of crossing, at a height suitable to carry boats across the river, and to supply a head of water in the lower level of the canal. M. is the owner of a mill, situate on the river, and driven by its waters, a short distance above the place where the canal crosses the river. In 1845, the company placed flash-boards on top of its dam, attached by means of iron pins, to be used during the boating season for the purpose of increasing the height of water in its dam and in the lower level of the canal. The effect of the use of the flash-boards is to throw the water back on the wheel of the mill, so as to interfere with its use. M. removed the flash-boards. On bill filed by the company for an injunction,—*Held*, that the company had a right, by its charter, to appropriate the waters of the river to its use, for its canal, without compensation first made to persons injured; and that, the use of flash-boards for that purpose being lawful, M. had no right to remove them, but must resort to an action for damages.

On appeal from a decree of the vice-chancellor, whose opinion may be found in *Lehigh Valley R. R. Co. v. McFarlan*, 3 Stew. 180.

Mr. F. T. Frelinghuysen, for appellants.

I. The canal company claims the open, continuous and adverse enjoyment of the dam, with flash-boards eight inches wide, and all the consequences thereof, for more than twenty years, as conclusive evidence of a grant therefor.

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When one raised the water in his pond to the height of his dam, whenever the water was high enough in the stream, and continued this more than twenty years, under a claim of right, it is held that the height of the dam fixes the extent of his easement or right of flowing, although at times the water in the pond was below the top of the dam. *Washb. on Eas.* *103, *105, *106; *Winnepiseogee Co. v. Young*, 4 N. H. 436.

“Rights to an easement, acquired by long possession, ought to stand on the same ground as rights by possession in land. The real principle underlying the right, is the same precisely on which the statute of limitation stands.” *Washb. on Eas.* *72; *Tracy v. Atherton*, 36 Vt. 503.

Justice Depue, in *Horner v. Stillwell*, 6 Vr. 314, says: “The evidence of title to an incorporeal hereditament, and of the transfer of it, is governed by the same principles which apply to other real estate,” and quotes many authorities. *Earl v. De Hart*, 1 Beas. 281. In that case it was the easements of a ditch to carry off rain and melted snow. The tenant occasionally stopped the ditch, but it was immediately opened. *Shield v. Arndt*, 3 Gr. Ch. 235.

“An exclusive enjoyment of water, or of light, or of any other easement, in any particular way, for twenty years, without interruption, becomes an adverse enjoyment sufficient to raise a presumption of title as against a right in any other person which might have been, but was not, asserted.” *Shreve v. Voorhees*, 2 Gr. Ch. 25.

(1) The use was adverse, that is, was enjoyed while claiming the right to the use, and not by license or permission.

It is an important circumstance in determining whether the user of the right claimed is adverse or not—that it is contrary to the interest of the owner. It is contrary to his interest to have back-water on his wheel. *Washb. on Eas.* 125; *Arnold v. Stevens*, 24 Pick. 106.

Again, it is an adverse assertion of right to do that which would expose the party to an action. *Fellows v. Simpson*, 11 Ind. 84; *Urbane v. Patrick*, 1 Jones (N. C.) 23.

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(2) Mr. McFarlan acquiesced. This is the point that the vice-chancellor relies upon and quotes.

Whenever, and only when an officer of a corporation, acting within the range of his authority, can bind the company, notice to him is notice to the company. *Wharton's Com. on Agency* §§ 183, 184; *Taunton Bank v. Woodruff*, 1 Gr. Ch. 117; *Mechanics Bank v. Seton*, 1 Pet. 199; *Tyman v. Bank*, 12 How. 225; *Housatonic Bank v. Mathier*, 1 Metc. (Mass.) 294.

A principal is not bound by a notice to an agent acting out of his special sphere. *Fuller v. Bennett*, 2 Hare 402; *Hurin v. Mill*, 13 Ves. 120; *Lawrence v. Tucker*, 7 Greenl. 195. He acquiesced. I submit the law is, as before stated, and as held by *Washburn*, p. 146: "If the owner of a dam, or his predecessors, have, in fact, enjoyed and exercised the right of keeping up his dam and flowing the land of another, for a period of twenty years, without paying damages therefor, or any claim or assertion of a right to damages for such flowing, it is, in itself, evidence of a prescriptive right to continue such flowing." *Williams v. Nelson*, 23 Pick. 141; *Perrin v. Garfield*, 37 Vt. 310; *Brace v. Yale*, 10 Allen 443.

II. The canal company claim a charter title to the dam and flash-boards, obtained by the exercise of the power of eminent domain, the enjoyment of which for more than twenty years, whether with or without the acquiescence of Mr. McFarlan, renders that title, were it defective, perfect, and shows that Mr. McFarlan has received the statutory compensation for such title.

The Morris Canal and Banking Company was incorporated December 31st, 1824 (*P. L. 1824 p. 158*). The constitution then existing was adopted July 2d, 1776 (*Elmer's Dig.*), and contains no provision like that of our present constitution, adopted June 29th, 1844, which, by Art. 4, Sec. 7, pl. 9, ordains that "individuals or private corporations shall not be authorized to take private property for public use, without just compensation *first* made to the owner."

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The fifth section of the charter gives the authority to make the canal with its works, and gives the company, with its agents, authority, from time to time, to enter upon lands, whether covered with water or not, for the purpose of surveying the route or routes for the said canal and locating the works. And when the route shall have been fixed upon, which is to be evidenced by depositing a survey thereof in the office of the secretary of state, then it shall be lawful for the company "at any time to enter upon and take possession of and use all and singular such lands, waters and streams, subject to such compensation, to be made therefor as is hereafter directed."

This fifth section does not require the quantity of land to be stated, or the height of the dam fixed. The rule was different in *Vail v. Morris & Essex R. R. Co.*, 1 Zab. 189, and the supreme court, in *Den v. Morris Canal and Banking Company*, 4 Zab. 591, calls attention to this distinction. *Kough v. Darcy*, '6 Hal. 284; *Den v. Morris Canal and Banking Company*, 4 Zab. 589.

The court approves the construction thus given the charter of the Morris Canal and Banking Company, in *Hetfield v. The Central Railroad Company of New Jersey*, 5 Dutch. 575. The suit provided for in Sec. 20 being for compensation, covers all, direct and indirect, immediate and consequential, injury, whether by actual compensation or remote deterioration. It covers the back-water on McFarlan's wheel. It comes in the place of an assessment, and the damages covered are as extensive. *Van Schoick v. Del. & R. Canal Co.*, Spen. 253.

(2) The canal company has a charter title to the dam at its present height, under the power of eminent domain, and it matters not on this point whether the eight inches were added in 1845 or in 1857, for the charter title of the company accrued at once, whenever it was.

The dam was raised by the company in the exercise of a charter right, and is, as raised, a lawful structure and not a nuisance.

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(3) The raising of the dam in question is a raising of eight inches; that is the addition he says was on in June, 1875; that is what he says he took off; that is what the company spiked on again. It is the eight inches that the decree of the chancellor justifies Mr. McFarlan in having taken off and in keeping off. I submit that the evidence before referred to, proves, beyond a doubt, that the raising of the dam was, in 1845, as an incident to the enlarged capacity of the canal. The company, in this view, sets up no lost grant, but a charter title, and the thirty years user of the dam, with the flash-boards on, claiming under this title, even were it defective, makes it perfect. A corporation in New York has no capacity to take under the statute of wills, yet the lapse of twenty years renders the title of the corporation perfect. *Harpending v. Dutch Church*, 16 Pet. 455.

III. If McFarlan had not been a director, and if the charter of the Morris canal was not peculiar, on the authority of *Trenton Water Power v. Chambers*, 1 Stock. 471, McFarlan could have no claim, except for compensation.

IV. But if the views taken are erroneous, I submit that the decree in this case should not be affirmed, for three reasons:

(1) Because McFarlan filed a cross-bill, in which he prayed that the height to which the canal company had raised the dam by fastening scantling to the string-pieces might be ascertained by the court. To that bill an answer is filed, setting up new equities against McFarlan. The court has not found out, as McFarlan asks, how much the dam has been raised, but says to McFarlan, "you were right in cutting it down eight inches; go and do it again." It is true the dam may not have been raised two inches by the eight-inch scantling, as, it being fifty years old, it may have greatly settled. We think the decree authorizing McFarlan to cut down the dam eight inches, and thus destroy a public

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work, should be reversed, at all events until the issue formed by both parties is determined.

(2) One has no right to abate a nuisance and thereby damage those who are innocent of the nuisance. *Amick v. Pratt*, 13 Gratt. 567. The owners of the scores of boats loaded with merchandise were, by reason of Mr. McFarlan's taking down the dam, detained, and they were innocent of the nuisance, and he committed a nuisance in the abatement.

(3) The court, we think, should not justify a willful injuring of the canal or works connected therewith. The thirteenth section of the charter of the company enacts that if any person shall, in any manner, willfully (that is, by design and with set purpose) or maliciously injure said canal, or any of its parts or works therewith connected, he shall be held guilty of a misdemeanor. Mr. McFarlan three times, in a few days, ordered the plank to be cut away. This damaged the company a thousand dollars a day, and the citizens of the state vastly more.

There is authority to sustain the position, that when one has forborne to abate a nuisance which is a private structure, for many years, though less than twenty, his right to abate *vi et armis* is gone. *Moffit v. Brewer*, 1 Greene (Iowa) 348. But our public works, railroads and canals, because the whole community are interested in them, have a much higher sanctity

Messrs. McCarter & Keen, for appellants.

I. The defence set up by the defendant's answer in this case, viz., that the flash-boards were never placed on the dam by the canal company until 1857, totally fails.

II. The evidence on both sides shows, and the vice-chancellor finds as a fact, that the use of the flash-boards commenced in 1845, at the time the canal was widened and deepened throughout its whole length, and continued every year, during the summer, from 1845 to 1875.

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III. The canal company, by the provisions of its charter, acquired the right to use and maintain the flash-boards as a part of the dam, by the exercise of the right of eminent domain. *Charter of Canal Co., P. L. 1824 p. 160 § 5; Kough v. Darcey, 6 Hal. 237; Den v. Canal Co., 4 Zab. 587.*

IV. The canal company acquired the right to use the flash-boards by an open, notorious, uninterrupted and adverse user for more than twenty years. *Earl v. DeHart, 1 Beas. 280; Stuyvesant v. Woodruff, 1 Zab. 133, 139, 154; Shields v. Arndt, 3 Gr. Ch. 224, 246; Shreve v. Voorhees, 2 Gr. Ch. 25, 32; Veghte v. Raritan Water Power Co., 4 C. E. Gr. 142, 155.*

V. The rule acted upon by the vice-chancellor, that verbal remonstrances or denials of the right which would otherwise be acquired by the user, is sufficient to defeat the right and destroy the effect of the user, has never been adopted in New Jersey, and is no longer law anywhere. On the contrary, it is well settled that the law governing the acquisition of title to incorporeal hereditaments by user, rests on the same principles which apply to adverse possession of real estate corporeal. *Horner v. Stillwell, 6 Vr. 307, 312; Cobb v. Davenport, 3 Vr. 369, 386; Society v. Holsman, 1 Hal. Ch. 126; 3 Starkie's Ev. 1216-17; 1 Greenleaf's Ev. p. 22 § 17; 2 Greenleaf's Ev. p. 497 § 545; Id. 491 § 539; Angell on Limitations p. 3 ch. 1 § 4; Den v. Mulford, 1 Zab. 506; Den v. Morris, 2 Hal. 6; Eldridge v. Knott, Cowp. 215; Knight v. Halsey, 2 Bos. & Pull. 206; Roe v. Ireland, 11 East 280; Holcroft v. Heel, 1 Bos. & Pull. 400; 3 Kent Com. 446; Tyler v. Wilkinson, 4 Mason 402; Coe v. Wolcottville Mfg. Co., 35 Conn. 175; Statutes of Conn., Limitations, p. 551, title 39 § 1; Sumner v. Child, 2 Conn. 628; 2 Wait's Actions and Defences 685; Bright v. Walker, 1 C. M. & R. 217, 219; Cornelius v. Empson, 1 Dutch. 31; Den v. Hunt, Spen. 491; Brian v. Atwater, 5 Day 188; French v. Pearce, 8 Conn. 439; Stillman v. White Rock Mfg. Co., 3 Woodb. & M. 538; Levitt v. Wilson, 3 Bing. 115;*

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Eaton v. Swansea Water Works, 17 Q. B. 267; *Barrell v. Bagg*, 8 Gray 441; *Sibley v. Ball*, 11 Gray 417; *Nichols v. Naylor*, 7 Leigh 546; *Hall v. Augsburg*, 46 N. Y. 622.

VI. The circumstances proved in the case show that McFarlan is equitably estopped from interfering with the company's use of the flash-boards by forcible means or otherwise. *Kerr on Injunctions*, 291, 292, 293; *Greenhalgh v. Manchester R. R.*, 3 Myl. & Cr. 784; *Williams v. Earl of Jersey*, 1 Cr. & Ph. 91; *M. & E. R. R. Co. v. Pruden*, 5 C. E. Gr. 541; *Trenton Water Power Co. v. Chambers*, 1 Stock. 471; *Erie Railway Co. v. D. L. & W. R. R. Co.*, 6 C. E. Gr. 283.

VII. When the defence set up in defendant's answer fails, and he places his defence on other grounds than those stated in his answer, such equitable estoppel may be invoked to rebut such defence, although the circumstances out of which it arises are not stated in the bill.

VIII. In any event, under the charter of the company, and the authorities cited under point III, the remedy of defendant, if he has any, is not by a forcible abatement of the canal, or that portion of it which causes him an injury. *L. V. R. R. Co. v. Society*, 3 Stew. 145; *Charter of Canal Co.*, P. L. 1824 p. 165 § 13; P. L. 1872 p. 146.

Mr. H. C. Pitney, for defendants.

The single issue presented by the pleadings is, has or has not, the complainant the legal right, as against the defendant, as riparian proprietor, to maintain that part of the dam which was abated? That the dam, in its present condition, is a nuisance to the defendant, is not denied, and the right to abate it is indisputable, unless the complainant has the right to maintain it. This is the issue, and the burthen of maintaining it is on the complainant. In sustaining it, the *probata* must correspond with the *allegata*. This is a rule adhered to with wise tenacity in this court.

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Smith v. Axtell, Sax. 494; *Parsons v. Heston*, 3 Stock. 155; *Marsh v. Mitchel*, 11 C. E. Gr. 497; *Brantingham v. Brantingham*, 1 Beas. 160; *Hopper v. Sisco*, 1 Hal. Ch. 343; *Howell v. Sebring*, 1 McCart. 84.

I. The right in question is called *easement of flowage*. Defendant does not complain of the dam as a structure, except so far as it affects him, and the right claimed by the complainants is not so much to maintain the dam as a structure, as to make such use of it as to pen back the water and obstruct its flow on defendant's land. Now, *easements* acquired by adverse user rest on the idea of a *lost grant*. All easements are properly said to lie in *grant*. They are incorporeal and incapable of livery of seizin. *Gale & Whatly*, *18; *Washburn* *18; *Co Lit.* 9a.

In New Jersey, as a matter of pleading in the common law courts, the right must be pleaded as having had its origin in a grant which has been lost. A pleading setting up an easement acquired by prescription, in New Jersey is bad. It has been held that there can be no such thing, strictly speaking, as prescription here. It results from this rule that the user relied upon *must be precisely such in its character as it would have been if it had been enjoyed under an actual grant*. That is, the enjoyment must be in all respects such as a person having an absolute right would have had. This is fundamental, and must be borne in mind. See, generally, *Washb. on Eas.* 65, *et seq.*; *Gale & Whatly on Eas.* 86, *et seq.*

The inquiry, then, is, as to the *character, extent and continuance* of the issue relied on.

(1) As to *character*—Was it *adverse and continuous*?

(2) As to *extent*—How much? how was the water maintained? for how much of the time? all the year, or parts only? steadily, or occasionally?

(3) As to its *continuance*—For how long a time? for twenty years, or less?

First—then, as to the character of the user relied on. Was it *adverse and continuous*? “In order that the enjoyment which is the *quasi-possession* of an easement, may con-

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fer a right to it by length of time, it must have been *open, peaceable and as of right.*" *Gale & Whately* *121, *et seq.*

The language of Bracton is: "*Longus usus, nec per vim, nec clam, nec precario*"—"per patientiam veri domini, qui scivit et non prohibuit sed permisit de consensu tacito." (*Putnam v. Ballard*, 9 *Pick.* 251-254.) That is—*Long* (more than twenty years), *without force or contention, openly and not secretly, and not by permission asked and granted, but as of right.* *Gale & Whately* *122, 123; *Tickle v. Brown*, 4 *Ad. & El.* 369; *Goddard on Eas.* 121-128; *Washb. on Eas.* *86, *112.

The difference between corporeal and incorporeal rights, in respect of capacity of being the subjects of actual and exclusive possession, is radical and important. At the common law a man might have and enjoy actual title to land without any written evidence of it, resting alone on his seizin. But it was not so with incorporeal rights, not the subject of seizin, and for which a grant was absolutely necessary. So that the actual loss of the grant might, and, in the absence of competent proof of its once existing, probably would, result in the loss of the right itself. A mere verbal inhibition is sufficient. "At the common law," says Mr. Gale, "any acts of interruption or *opposition*, from which a jury might infer that the enjoyment was not right-ful, were sufficient to defeat the effect of the enjoyment, the question being, whether, under all the facts of the case, such enjoyment had been under a *concession of right*;" and, again: "By the civil law, any enjoyment was said to be forcible to which opposition was offered either by *word* or deed by the owner of the servient tenement." As before remarked, *acquiescence* of the owner in the enjoyment is essential, and anything which disproves acquiescence defeats the accruing of the right. *Powell v. Bragg*, 8 *Grey* 441; *Eaton v. Swansea Water Works*, 17 *Ad. & El. (N. S.)* 267; *Stillman v. Man. Co.*, 3 *Woodb. & M.* 538; *Livett v. Wilson*, 3 *Bing.* 115; *Bright v. Walker*, 1 *Crompt. M. & R.* 219; *Cuthbert v. Lawton*, 3 *McCord* 195; *Nichols v. Naylor*, 7 *Leigh* 565; *Olney v.*

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Gardner, 4 M. & W. 500. The cases in 8 Grey, 3 Woodb. & M., and 7 Leigh, are much in point. Washb. Eas. *112.

The distinction between adverse *occupation* or *possession* of land and adverse *user* of an *easement*, is clearly shown in *Powell v. Bragg*. Nobody pretends that twenty years adverse possession passes the title. Its effect is only, under the statute, to bar the remedy. So, a single act of interruption during the running of the twenty years, is sufficient to defeat the acquisition of the easement. *Tickle v. Brown*, 4 Ad. & El. 369; *Livett v. Wilson*, 3 Bing. 115; *Carlile v. Cooper*, 4 C. E. Gr. 256, 260–263; *Sumner v. Tileston*, 7 Pick. 198. Further, the user must have been without force, under an open claim of right, and not by permission asked and obtained.

Now apply these principles to the case in hand.

(a) The right to use flash-boards has always been denied, and their use forbidden, resisted, interrupted on our part, and not even claimed—at least until within a few years—to be of right by the other side.

(b) The use was always, up to a very recent date, either by *permission* asked and granted, or by *force*, either *precario* or *per vim*.

Second—As to the extent of the user.

The measure of the right in these cases is the height to which the water has been kept, continuously, during the required time; not the height of the *dam*, but of the water. The measure of the right is the extent of the adverse use. *Carlile v. Cooper*, 2 C. E. Gr. 526; 4 C. E. Gr. 256; 6 C. E. Gr. 576.

Now, how high did the water stand, years ago, in the river and in the four-mile level? On these points we have a variety of evidence. We will commence, as the complainants did in proving their case, with the four-mile level.

(1) Here we have a piece of timber laid horizontally in the stone abutment at the end of the lock, and on the north or berme bank of the canal, now eight inches below the surface of the water, placed there for the purpose of nailing.

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rubbing-plank or sheathing. Naturally, one would suppose that this timber or string-piece was originally placed above the water.

(2) Then we have the general increase in the height of the water in the canal, and in the tonnage of the boats.

(3) The actual increase in the height of the dam. The evidence is clear that, previous to the enlargement of the canal, the dam consisted of the same stone work now there, with a single stick of timber on it from six to eight inches wide. It had settled toward the north end, and a hollow place had formed, where the water all passed, in low stages.

Third—There remains to be considered, the length of time of the user. This point has been mostly anticipated. The flash-boards were first used in connection with the larger boats used after the enlargement of the canal, which occurred between 1845 and 1850. As before shown, and as appears by the height to which the water was kept in the four-mile level previous to 1857, the combined height of the permanent structure and flash-boards before 1857, was not greater than the permanent structure alone after 1857. But, as before shown, their use was always precarious and greatly interrupted. Then we have the marked increase in 1857, which, of course, is within twenty years of the abatement of the dam. Then we have the decided interruptions proved by Mr. Hinchman and Mr. Talcott. So that there is no actual use for twenty years, even if it had the requisite qualities to make it available for complainants.

II. The mere fact that a director of a railroad or a canal company is cognizant of, and, if you will, acquiesces in, plans of construction which include the appropriation of a part of his property, does not preclude him from claiming compensation for his property so taken, and from pursuing all legal remedies for that purpose. No proof, however, of anything of the kind is here shown against McFarlan. The mere fact of his being a director does not prove it. There is no proof of any plan being adopted which included the raising of the dam.

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The widening and *deepening* of the canal did not necessarily include the *raising* of the dam, though it might the deepening of the bed of the river at the crossing. The history of the use of the flash-boards disproved any settled plan which included them as a permanent part of the canal.

The right given by the fifth and sixth sections of the charter to enter and occupy, without first making compensation, reserving by the twentieth section their rights of action to all parties aggrieved, does not include the right, years after the first right of entry has been exercised and the works erected, to do what has been done here—add to the height of a structure once fixed, and thereby ruin valuable private property. The reading of those sections will not bear any such construction. Creating and maintaining a nuisance like that in question here, was not contemplated by those sections.

McFarlan, having arranged his machinery to suit the dam as originally fixed, the canal company are estopped from claiming under their charter any peculiar immunities against the common law right of abatement. But, admitting, for argument's sake, that such immunity may exist, yet it cannot avail the complainant here, for several reasons:

First—No such case is made by the bill. As before shown, complainants put themselves upon a *legal* right to maintain the dam acquired by condemnation proceedings, and also by adverse use for more than twenty years.

Second—They cannot, if the right to maintain at the increased height has not been acquired, ask a court of equity to protect them in the enjoyment of a structure which injures another, unless they, at the same time, offer to make compensation.

Admitting, for argument's sake, and for that only, that, by the strict letter of your charter, you have the right in law to maintain the dam at any height without making, or offering to make, any compensation, yet it is contrary to the spirit and equity of the statute for you so to do, and equity will

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not uphold you in so doing, nor aid you in persisting in so doing.

To enjoy a man's property against his will and without making him compensation, is contrary to the very first principles of justice, to say nothing of equity, and so I go further, and say that, though it may be illegal, it is not inequitable for me, under the circumstances, to compel you to do me justice by abating the injurious structure. These principles are fundamental. 1 *Story's Eq. Jur.* § 64e, and cases cited. *Willard's Eq.* p. 46, and cases cited. *Comstock v. Johnson*, 46 *N. Y.* 615; *Sturgis v. Champneys*, 5 *M. & C.* 97; *Trenton Water Power Co. v. Chambers*, 1 *Stock.* 471; *Central Railroad v. Hetfield*, 3 *C. E. Gr.* 323.

The opinion of the court was delivered by

DEPUE, J.

The Morris Canal and Banking Company was incorporated by an act of the legislature, passed on the 1st of December, 1824, and was authorized to construct a canal to unite the river Delaware, near Easton, with the tide-waters of the Passaic (*P. L.* 1824 p. 158). By the act of January 26th, 1828, the company was empowered to extend its canal to the waters of the Hudson, at or near Jersey City (*P. L.* 1828 p. 34). In 1845, the canal was enlarged to provide for its navigation with boats of greater capacity. In 1871, the canal, its property, works and franchises were granted by a perpetual lease to the Lehigh Valley Railroad Company, under the authority of the legislature of this state (*P. L.* 1871 p. 444).

The canal was constructed from the Delaware to the Passaic, in 1828, and extended to Jersey City in 1830. The summit level of the canal is in the county of Morris, near Lake Hopatcong, and from that source, water for the supply of the eastern division of the canal is mainly obtained. East of the summit level, the canal enters the valley of the Rockaway, and, at Dover, in the county of Morris, it crosses

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the Rockaway river. The crossing of the river is effected by means of a lift-lock, which discharges the waters from the upper level of the canal into the river, and a guard-lock on the opposite side of the river, through which the water flows into the lower level of the canal; and, also, a dam across the river, which holds the water at the place of crossing, where the waters of the canal and those of the river are commingled, to a height suitable for the purpose of carrying boats across the river and supplying a head of water upon the lower level, called, in the pleadings, "the four-mile level." The original dam is a substantial, permanent structure, and was erected about the year 1828. In 1845, when the canal was enlarged, the company placed on the top of the dam, planks or flash-boards, attached by means of iron pins, so as to be capable of being put on or taken off, at pleasure, that they might be used or dispensed with, as occasion might require.

McFarlan is the owner of a rolling-mill and iron-works, situate on the Rockaway river, a short distance above the place where the canal crosses the river. His works are driven by the waters of the Rockaway, taken from the river a few hundred feet above the intersection of the canal with the river, and discharged again into the river above that point.

The defendants do not deny the complainants' right to maintain that part of the dam which is permanent. The controversy relates solely to the maintenance of flash-boards on the permanent structure during the boating season, for the purpose of keeping the water to the requisite height in the level eastward of the guard-lock, and it is undisputed that when the flash-boards are on, and the dam full, the water is thrown back on the wheel of the rolling-mill in such a manner as greatly to interfere with its use.

In June, 1875, McFarlan leased the rolling-mill to Wynkorp & O'Conner, for the term of two years. The tenants, finding the use of the water-wheel of the mill impeded by the back-water, on the 26th of July, by the direction of

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McFarlan, removed the flash-boards from the company's dam. The flash-boards having been immediately replaced, the defendant, on the next day, again removed them. Thereupon, this bill was filed for an injunction to restrain the defendants from interfering with the complainants in rebuilding and maintaining the said dam, with the flash-boards thereon. A temporary injunction was granted, and, on final hearing, on the advisory opinion of the vice-chancellor, the injunction was dissolved, and the bill dismissed, from which decree this appeal was taken.

The complainants rest their prayer for relief on a claim of a right to increase the height of their dam during the navigation season, by the addition of flash-boards eight inches in width. On the argument, it was sought to deduce this right from several considerations.

The complainants invoke the doctrine of equitable estoppel from the long acquiescence by McFarlan in the use of the flash-boards, and the fact that he was a director of the canal company when its lease was made to the other complainant.

The complainants also set up a right in themselves to hold the water at the height at which it will be held by flash-boards, and to flood the lands of McFarlan to that extent, by prescription arising from a use of more than twenty years.

I do not deem it necessary to examine either of these grounds for relief, inasmuch as, in the judgment of this court, the decision of this case should be placed on another and a distinct ground, founded on the rights of the canal company under its charter.

The charter of the company was granted in 1824. By the constitution of this state, in existence at that time, it was competent for the legislature to authorize the taking of the property of private individuals for public uses without compensation first made. *Den v. Morris Canal Co.*, 4 Zab. 587. This charter is irrepealable, and created a contract which is incapable of alteration or repeal by the legislature,

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except by mutual consent. In fact, no effort has ever been made to effect any change in it in the respects which are material to the present case. It is unaffected by the provision of the constitution of 1844, which interdicts the taking of property by private corporations for public use without compensation first made. *Const. 1844, Art. IV, § VII, ¶ 9.* A state constitution is a law within the meaning of that clause of the constitution of the United States which ordains that "no state shall pass any law impairing the obligation of contracts." *Dodge v. Woolsey, 18 How. 331; R. R. Co. v. McClure, 10 Wall. 511.* The company's charter, and the powers and privileges therein granted, continue, notwithstanding the change of policy adopted by the constitution of 1844, and possess equal vitality with respect to acts done by the company under it after the constitution of 1844 became the fundamental law, as if done before the adoption of that instrument.

That the charter of this company authorizes the taking and appropriation of property of private individuals for its use, at the will of the company, and without compensation therefor first made, seems to me to be too clear for successful denial.

The fifth section of the act authorizes the company to construct a canal or artificial navigation, to connect the waters of the Delaware river, near Easton, with the tide-waters of the Passaic river, with all the locks and works necessary for the use of said canal. It further provides that it should be lawful for the said company to enter, from time to time, and upon all times, upon all lands, whether covered with water or not, for the purpose of exploring or surveying the route or routes of said canal, and locating the several works, as above specified, doing thereunto no unnecessary damage; and when the said route or routes shall have been fixed upon, and its several works located by its president or directors, or a majority of them, and a survey thereof deposited in the office of the secretary of state, it should be lawful for them, and for any agent,

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superintendent, engineer, contractor, or any person or persons employed in the service of said corporation, at any time, to enter upon, take possession of, and use all and singular such lands, waters and streams, subject to such compensation to be made therefor as is thereafter directed.

By the sixth section it was enacted that, where lands, waters and streams, that may be useful for such canal, shall not be made a free gift by their owner or owners, to the said company, then the company shall pay to the owner or owners such compensation as shall be mutually agreed upon; and, in case of disagreement in relation to the value of such lands, waters and streams, it should be lawful to and for the aforesaid president and directors, from time to time, and at all times, to cause a survey or surveys, and map or maps, to be made of any of the lands, waters and streams in their estimation requisite, and not given as aforesaid, and which they are authorized by this act to take for the uses aforesaid, and to exhibit the same to one of the justices of the supreme court of this state, who is required to appoint appraisers, whose duty it was made, if requested so to do, by the owner or owners or by the company, to make a just and equitable estimate and appraisal of the value of the lands and damages to the several owners, proprietors or parties interested in the premises so required for the purposes aforesaid; and it was provided that the company shall pay or tender the damages so assessed, to the person or persons entitled thereto, and immediately thereupon the estate, right, property and interest in and to the premises so appropriated, described and appraised, should be vested in the company, to be by them held so long as they shall be used for the purposes of said canal.

The twentieth section provides that nothing in the act should be taken to impair the right of any person to an action against the said company, for damages to his or her water rights, lands, tenements or hereditaments, by the erection of said canal, where such person hath not been agreed with by the said company, or his or her damages,

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right and estate satisfied and vested in the said company, under the previous provisions of the act; and the twenty-seventh section enacts that the twentieth section should be so construed as to extend to the damages sustained by the subsequent operations of the company, from time to time, as the same may arise.

By force of these charter powers, the entry upon, occupation of and use of lands, and the appropriation of waters necessary for the use of the canal, as from time to time may be determined upon by the company, is made lawful. The title to lands so taken, and the right to the waters so appropriated, do not finally vest in the company, until compensation be made; but, nevertheless, the occupation and use thereof are lawful, leaving the damages sustained by the injured parties to be recovered in the manner pointed out by the act, by actions at law, if the amount of compensation to be paid has not been ascertained by the appraisement of commissioners appointed as prescribed by the act.

This construction was placed on the company's charter by Chief-Justice Ewing, as early as 1830 (*Kough v. Darcey*, 6 Hal. 237), and was emphatically endorsed in the judgment of the supreme court in *Den v. Morris Canal*, 4 Zab. 587. The case last cited is a precedent directly in point. It was an action of ejectment to recover lands occupied by the company for its canal, where no agreement for the use of the lands, and no legal assessment, payment or tender of the damages by the company had been made. The court held that upon the true construction of its charter, the company had authority to take and use the land, and construct their canal upon it, without any agreement with the owner therefor, or assessment and payment, or tender of damages, and that ejectment would not lie; that the company was not a wrong-doer in taking possession under such circumstances, and that the plaintiff's remedy was by action for compensation under the twentieth section of the charter, and not by ejecting the company from the premises.

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The injury which McFarlan sustained by back-water, is one which the company was authorized by its charter to do, if it resulted from the construction of its canal, and for which the injured party's only redress is by action for damages. The depreciation or diminution in value of adjacent property, not actually occupied, caused by back-water, is a taking, within the meaning of an act of the legislature, of this character. *Glover v. Powell*, 2 Stock. 211; *Trenton Water Power Co. v. Raff*, 7 Vr. 335. The language of the charter leaves no doubt on this subject. The fifth section gives the company power to enter upon, take possession of, and use all and singular such lands, waters and streams, as may be necessary for the construction and use of its canal, subject to the compensation in the act directed. The twentieth section, which provides for the means of obtaining compensation, impliedly gives a right of action to the person injured, for damages to his or her water rights, as well as to his lands, tenements and hereditaments, arising from the construction of the canal; and the twenty-seventh section extends that remedy to damages sustained by the subsequent operations of the company, from time to time, as the same may arise. In construing the twentieth section, Chief-Justice Ewing, in *Kough v. Darcey*, remarks that "In the first place, this section embraces all persons who may sustain injury or suffer damage in lands, tenements, hereditaments and water rights, by the erection of the canal, in whatsoever mode such injury or damage may accrue, whether direct or indirect, immediate or consequential, whether by actual occupation, or by remote deterioration; in the second place it covers the same extent of damages, right and estate, which are provided for and which may be satisfied by or vested in the company, in virtue of the previous sections." The same views with regard to the company's rights under its charter, are expressed by Mr. Justice Elmer, in *Den v. Morris Canal*, *ubi supra*. Referring to the observation of Chief-Justice Ewing, above quoted, and speaking of the twentieth section



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of the charter, he says: "It is, therefore, one of the modes of compensation directed by the act, authority being thus given to the company to take possession and use the requisite land, subject to being sued by the proprietor for such damages as he thereby sustained, including the taking from him his estate therein, unless he thought proper to agree upon the proper compensation, or to await an assessment, it follows as a necessary construction, that the taking and using was meant to be absolute, and not subject to be afterwards disturbed. The taking and using subjected the company to be called upon for compensation, at the option of the proprietor, to the whole extent of the injury done to his possession and estate, by means of a suit at law." The same learned judge, speaking on the subject of the rights of the company under its charter, in lands appropriated to its use in constructing its canal, says: "It being established that the preliminary survey was sufficient, and that, by the true construction of the charter, the company have authority to take and use the land, that is, to construct their canal upon it, before any agreement was made with the owner, or any assessment or tender of the damages, subject to the liability of being sued for the damages thus occasioned, I think it follows, as a necessary implication, that the owner cannot recover the possession by action of ejectment. Such an action is not an action for the recovery of damages, within the meaning of the twentieth section. It would be absurd to suppose that the legislature meant to give the company a right to take the land, and construct the canal upon it, and, upon failure to obtain a valid assessment of the damages, subject the whole work to be destroyed by permitting a part of it to be taken from their possession, and filled up or otherwise obstructed."

In the first of the cases cited, it was held that, in taking property for the construction of its canal, the company could not be regarded as a trespasser for the purposes of an action by the injured party, for compensation. In the other case, it was considered that an entry on lands, without the

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consent of the owner, or payment or tender of damages, did not make the company a trespasser for the purposes of an action of ejectment. In both cases, the taking and possession were regarded as lawful, and the only remedy for the injuries consequent thereupon, arising either from the actual occupation of lands, or from the injurious effects upon water rights, and whether the damages were direct or consequential, was by action.

Following these precedents, and guided by the true construction of the company's charter, it is manifest that these defendants cannot resort to the means of redress they sought to adopt. They claim a right to abate a private nuisance, by removing a portion of the company's dam. The foundation of the right to abate is, the unlawfulness of the structure complained of. That foundation does not exist. The charter of the company authorizes and legalizes the erection of works of the character complained of, and provides another mode of redress for private injuries, as the only means of relief. And it was competent for the legislature, at the time this charter was granted, to confer upon a corporation the powers and privileges granted to this company.

In the pleadings, the right of the complainants under their charter to erect this dam as it was constructed, is distinctly put in issue. The complainants, in their bill, set out the charter of the company, and the supplements thereto, and aver that "the said Morris Canal and Banking Company, under and by virtue of the power and authority conferred upon it by the said act of incorporation, and the several supplements thereto, was fully authorized and empowered to erect and maintain said dam for the purposes aforesaid."

The defendants, in their answers, insist that "the said Morris Canal and Banking Company never acquired any right, either by its said act of incorporation, or by any of the supplements, or amendments thereto, or in any other way, to dam said river at said point of intersection, for any

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other purpose than simply that of floating the boats through said river; and that neither said complainant, the Morris Canal and Banking Company, nor the Lehigh Valley Railroad Company, ever acquired, in any manner whatever, as against any riparian proprietors, either above or below the said canal dam, the right to use said dam for the purpose of creating or maintaining a reservoir or feeder for the 'four-mile level' of said canal, and have never acquired any right, for any purpose, to back or dam the waters of said river upon the said tract of land of the defendant, Henry McFarlan, or to impede the natural flow of the waters in said river along said tract of land, or in said tail-race, and have no right whatever to dam said water, or to raise said canal dam higher than the top of the wooden sill or string-piece of said canal dam."

The evidence taken for the final hearing, shows that the dam, with the addition of flash-boards above the substantial structure, is necessary to an adequate supply of water to the lower level, and indispensable to the operations of the canal. The proof shows that, without the flash-boards, the navigation of the canal by boats of the draught to which the canal, after its enlargement, was adapted, would be permanently stopped over that level, and that no less than seventy-three loaded boats were grounded on that level while this supply of water was cut off by the act of the defendants.

Considering the character of the complainants' rights, and the nature and extent of the injury, public and private, that will result from the proposed interference with a great public work, this is plainly a case requiring the interposition of chancery.

The decree appealed from should be reversed, and a perpetual injunction decreed in accordance with the prayer of the bill.

Decree unanimously reversed.

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THE LEHIGH VALLEY RAILROAD COMPANY, appellants,

v.

HENRY MCFARLAN and others, respondents.

1. The appropriate relief against successive suits by the same plaintiff for damages arising from an injury which is continuous, is by application for the consolidation of actions, or for a stay of proceedings, and not by bill in chancery, unless the right in controversy has once been determined adversely to the plaintiff.

2. A bill of peace, enjoining a litigation at law, is allowable only when the complainant has already satisfactorily established his right at law, or where he claims a general and exclusive right, and the persons who controvert it are so numerous that the endeavor to establish the right by actions at law would lead to vexatious and oppressive litigation, and renders an issue under the direction of the court indispensable to embrace all the parties concerned, and to avoid multiplicity of suits.

3. It is not indispensable that the defendants shall have a co-extensive common interest in the right in dispute, or that each shall have acquired his interest in the same manner or at the same time; but there must be a general right in the complainant, in which the defendants have a common interest, which may be established against all who controvert it, by a single issue.

4. The rule with regard to multifariousness, whether arising from the misjoinder of causes of action, or of defendants therein, is not an inflexible rule of practice or procedure, but is a rule founded in general convenience, which rests upon a consideration of what will best promote the administration of justice without multiplying unnecessary litigation on the one hand, or drawing suitors into needless and unnecessary expense on the other.

5. The Morris canal enters into and crosses the Rockaway river at Dover. The crossing is effected by means of a dam in the river, which holds the water at the place of crossing at a height suitable to carry boats across the river and to supply a head of water in the lower level of the canal. M. is the owner of a rolling-mill situate on the Rockaway river and driven by its waters, which, after passing the water-wheel, are discharged into the river above the canal dam. H. is the owner of a grist-mill, saw-mill and forge situate on the river below the canal dam and driven by the waters of the river. V. and W. were the lessees of H.'s mills and forge. M. sued the company for injuries arising from back-water upon the wheel of his rolling-mill. H. and his tenants also brought suits to recover damages for diversion of the water from the mills and forge. The company filed a bill of peace, to enjoin the prosecution of said suits, and for the determination of the

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rights of the parties respectively in one suit, to be prosecuted under the direction of the court of chancery. The charter of the company authorized the appropriation of private property to its use without compensation first made, and gave to individuals who were injured thereby a right of action to recover compensation for their injuries.—

Held, that there did not appear to be such a unity, either in the grounds on which the several actions of the defendants rested, or in the defences proposed to be made thereto, as would make a bill of peace, and an issue thereunder, the appropriate method of settling the questions involved.

On appeal from a decree of the chancellor, reported in *Lehigh Valley R. R. Co. v. McFarlan*, 3 *Stew.* 135.

Mr. Thomas N. McCarter, for the appellants.

I. The authorities are abundant to show that, in such a case, equity will interfere to prevent multiplicity of suits. *Kerr on Inj.* p. 135 §§ 49, 50 ; 2 *Story's Eq.* §§ 853, 854 ; *High on Inj.* p. 35 § 53 ; *Eden on Inj.* (*Wheeler's Am. ed.*) pp. 416, 417 ; *New Elmc Hospital v. Anderson*, 1 *Vern.* 176 ; *Lord Tenham v. Herbert*, 2 *Atk.* 483 ; *Phillips v. Hudson*, *L. R.* (2 *Ch. App.*) 243 ; *Sheffield Water Works Co. v. Ycomans*, *L. R.* (2 *Ch. App.*) 8 ; *Trustees of Huntington v. Nicoll*, 3 *Johns.* 602 ; *Nicholl v. Huntington*, 1 *Johns. Ch.* 166–175 ; *Cross v. Burcham*, 1 *Black (U. S.)* 352–358 ; *Eldridge v. Hill*, 2 *Johns. Ch.* 281 ; *Powell v. Powis*, 2 *You. & Jer.* 158, and cases cited in note ; *Thompson v. Engle*, 3 *Gr. Ch.* 271.

The chancellor, in his opinion, relies largely on the case of *Eldridge v. Hill*, 2 *Johns. Ch.* 281, as authority for his position in this case. That was a controversy between two individuals only, and, although the complainant was harassed by successive suits, the chancellor held that, because the controversy was between two individuals only, a bill of peace to prevent multiplicity of suits would not be allowed. It is respectfully submitted that, even in that case, equity should have interfered to prevent oppressive and vexatious litigation. Nothing is more common than for courts of equity to entertain bills for account and injunction in cases

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of waste, and in other cases, to prevent multiplicity of suits, where the dispute is between two individuals only (see *1 Story's Eq.* §§ 517, 518), and that, too, when the title and even the possession is in dispute. But this is not a mere dispute between two individuals. It is between a great corporation exercising franchises of a public nature, in connection with a great public work, on the one hand, and a number of persons who have brought eight suits at law, when the real dispute in each is precisely the same. There is no precise number of persons requisite to give the court jurisdiction; the whole matter is within the sound discretion of the court.

The learned chancellor cites, with approbation, the following language of the supreme court of Massachusetts, in *Ballou v. Inhabitants of Hopkinton*, 4 Gray 324: "In regulating the rights of mill-owners and others in the use of a stream, whenever numbers of persons are interested, equity is able, by one decree, to regulate their respective rights, to fix the time and manner in which water may be drawn, and within what limits it shall or shall not be drawn by all parties respectively, and thus it is peculiarly adapted to the relief sought against such alleged nuisance and disturbance, and affords a more complete and adequate remedy than can be afforded by one or more suits at law." *Lehigh Valley R. R. Co. v. Society &c.*, 3 Stew. 162.

Nor does it excuse the oppressiveness of the litigation of which we complain, that complainants removed some of the suits to the United States circuit court. There is no dispute but that such removals were proper and lawful, and the court can readily see how it was necessarily and properly exercised in cases such as these. Complainants had the same right to remove the causes to the national tribunal that defendants had to sue in the local courts. The exercise of such a legal right cannot excuse conduct on the part of defendants which would otherwise be oppressive and inequitable, nor will this court visit any penalty or disability on the party who exercises such right.

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Nor is it any answer to our claim to say that the suits of defendants, sought to be enjoined, are mere "skirmishing for position," as the chancellor terms it. The courts of this state are not maintained for any such purpose, and the suggestion that the process and machinery of our tribunals of justice may be used for any such purpose, shows an additional reason why such conduct should be restrained.

II. As to multifariousness.

The right of complainant is common against all the defendants. The right of each defendant rests on a common foundation, viz., the right as riparian owner to enjoy the use of water on his land without hindrance or diversion. Thus far the suit is clearly not objectionable. But the claim is made that the complainant alleges an equitable defence to McFarlan's claim that does not apply to the claims of the other defendants. This is not a valid objection. See *N. Y. & N. H. R. R. Co. v. Schuyler*, 8 Abb. Pr. 66; *S. C.*, 17 N. Y. 592, 604; *Powell v. Powis*, 1 You. & Jer. 158, 165, cited above; see note, also. See, also, *Brinkerhoff v. Brown*, 6 Johns. Ch. 139; *Hammond v. Hud. Riv. Machine Co.*, 20 Barb. 378; *Boyd v. Hoyt*, 5 Paige 78; *Spaulding v. McGovern*, 10 N. B. R. 188; *Way v. Bragaw*, 1 C. E. Gr. 213; *Randolph v. Daly*, 1 C. E. Gr. 313; *Hicks v. Campbell*, 4 C. E. Gr. 183; *Marselis v. Morris Canal Co.*, Sax. 31.

The cases of *Brinkerhoff v. Brown*, *Hammond v. Hudson River Machine Co.*, *Boyd v. Hoyt*, above cited, and the case of *Fellows v. Fellows*, 4 Cow. 582, show that when maintaining a bill will prevent a multiplicity of suits, a demurrer for multifariousness is not looked on with favor. See *Story's Eq. Pl.* §§ 124, 271, 278; *Mayor of York v. Pilkington*, 1 Atk. 282.

III. The same argument and authorities which show that the demurrer will not lie against this bill, also sustain the point that there is equity in the bill to sustain the injunction, and will defeat the motion to dissolve on that account.

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IV. The only remaining question is, how the right to maintain the injunction is affected by McFarlan's answer? This motion is on behalf of McFarlan alone. McFarlan is already litigating the very question in this court. His denial of our equity is not of his own knowledge. The other defendants can derive no benefit from his answer. There is not in Mr. McFarlan's answer any such denial of the equity of the bill as will entitle him to a dissolution of the injunction.

Mr. F. T. Frelinghuysen, for appellants.

The defendants, excepting McFarlan (who has answered), demur to the bill because of the alleged misjoinder of McFarlan, because of the multifariousness of the bill, and because of want of equity in the bill, and those demurring also move to dissolve the injunction for want of equity in the bill.

I. The case of those demurring considered.

(a) The Halseys could not take advantage of the misjoinder of McFarlan, if it existed. "If the misjoinder is of parties defendant, those only can demur who are improperly joined." *Story's Eq. Pl.* § 544. "A joinder of too many persons as defendants when there is no misjoinder of subjects, is not a ground of demurrer by any one of them against whom the complainant states a good cause of action." *New Haven R. R. Co. v. Schuyler*, 17 N. Y. 592. If the demurrer means that the Halseys are misjoined, that is simply denying the equity of the bill as against them. That we will consider presently.

(b) Of multifariousness. "Multifariousness is joining in one bill several *matters* which are distinct against one defendant, or against several defendants." *Story's Eq. Pl.* § 271. It does not depend on the number of defendants, but on the *matter* set up in the bill.

The bill is filed by the complainants for the single purpose of protecting their dam across the Rockaway at Dover. If the Halseys, because the dam diverted the water, and McFarlan, because the dam backed water on his water-

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wheel, threatened to tear down the dam, a bill to enjoin both the Halseys and McFarlan would not be multifarious, and would not be so although they had different reasons for threatening to abate the dam. Neither is a bill multifarious which seeks to enjoin the same parties when they seek to abate the dam by a multitude of vexatious suits. Whether the suits are vexatious, we will see presently.

In *Mayor of York v. Pilkington*, 1 Atk. 282, 284; *Story's Eq. Pl.* § 124 125, the complainant filed a bill to quiet his right of fishing in the river Ouse (complainant here files a bill to quiet his right to essential works of the Morris canal), against a number of defendants who claimed several rights as lords of manor and occupiers of adjacent lands (the defendants here all claim in severalty, but all as occupiers of adjacent lands, and there is less diversity in this case). Objection was made (as here) that there was no privity between the defendants. On demurrer, the court sustained the bill, on the ground "that there was a right of sole fishery asserted by the complainant against *all the defendants*, and so here. Where the case made by the bill is so entire that it cannot be prosecuted in several suits, and yet each of the defendants is a *necessary party* to some part of the case as stated, neither of the defendants can demur for multifariousness, or for a misjoinder of causes of action in some of which he has no interest." *Spaulding v. McGovern*, 10 N. B. R. 188; *Randolph v. Daly*, 1 C. E. Gr. 313.

A bill is not demurrable for multifariousness which unites several matters distinct in themselves, but which *together* make up the complainant's equity, and are necessary to complete relief. *Hicks v. Campbell*, 4 C. E. Gr. 183. A bill is not to be treated as multifarious, even because it joins two good causes of complaint growing out of the same transaction, where all the defendants are interested in the same right. *Story's Eq. Pl.* § 282. Here all the defendants claim that their identical riparian right as land owners on the Rockaway, is impaired by the one dam across the Rockaway.

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It is well settled that when, as in this case, there is one person defending one right against many claiming against it, equity will interfere and determine the right in order to prevent vexatious litigation and a multiplicity of suits. *High on Inj.* p. 36 § 53; *Tenham v. Herbert*, 2 Atk. 483; *Wood v. Monroe*, 17 Mich. 238.

(c) We now consider the want of equity, both as a cause of demurrer, and as a reason for dissolving the injunction on the motion of those who demur. The demurring defendants, by demurring, admit—

(1) That as much water which did not naturally flow to the Rockaway was brought into that river as was diverted therefrom by the dam, in consequence whereof no diminution in the water in said Rockaway river below the dam at Dover was occasioned by the said dam.

(2) They admit that Joseph Jackson and John D. Jackson, under whom the defendants hold, gave the canal company, under which the complainants hold, a grant in fee in the nature of a perpetual lease to maintain the dam and flash-boards.

(3) They admit an adverse enjoyment for more than twenty years, of the dam and flash-boards, by complainants, and those under whom they claim.

(4) They admit that their suits are brought for diverting the water from the Rockaway at Dover, and that eight suits at law (five by the Halseys and three by the McFarlans) have been brought therefor since September, 1876, none of which has been tried. The eight suits are vexatious, not only by reason of their multiplicity, but because it is true, as admitted, that the complainants have the right to the water of the Rockaway, and that they, the defendants, are not in any way damaged. Of course, their suits are only vexatious.

(d) But the complainants have this further equitable defence of the dam, which cannot be set up at law: Should the complainants plead to the Halseys' suits at law, the general issue and the statute of limitations (and they could plead

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nothing more), and should the plaintiffs at law prove that for twenty years, to wit, from 1852, there had been a certain continuous flow in the river, and that, as laid in the declaration in 1872, the water had been diverted and diminished by the complainants, the plaintiffs would recover. *Archbold's Nisi Prius* 326. And yet they would, *in equity*, have no right to recover, for the reason that, prior to 1852, when the presumptive right began, the complainants, being the defendants at law, had, by legislative authority, saved water at Hopatcong and elsewhere, and lawfully (according to the adjudications of this state) turned the same into the Rockaway, and are under no greater obligation to keep the excess of water in the Rockaway uniform, than to have a uniform depth of water in their canal. Had the declarations alleged that the complainants had diverted the natural flow of the river, or had it complained of a diversion of water which of right ought to have flowed in said river, proof of uniform flowage for twenty years would at law be held to be proof of such right. For form of declaration see 2 *Chit. Pl.* (17th ed).

II. Mr. McFarlan's motion to dissolve on his answer, considered.

The dam was constructed in 1828, and, in the language of the answer, "was suited in height to the old canal and the boats first in use thereon." The answer further says, that the canal was originally constructed to be navigable by boats bearing only eighteen tons, and drawing three feet of water. In 1845 the canal was made five feet wider and one foot deeper. It is quite clear that Mr. McFarlan has no claim against the canal company, but we are told that we can show our presumptive title at law, and we answer:

III. That there are abundant reasons why this question between the canal company and McFarlan and the Halseys should be determined in equity, and that the complainants can not, according to law, without a hearing on the

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evidence, be turned out of this court. Those reasons are these :

(1) The canal company has a right to equitable relief against a multiplicity of suits.

(2) The Halseys, by their demurrer, admit that they have no cause of action, because they admit that there is no diminution in the waters of the Rockaway, and yet multiply suits for diminution ; admit that the canal company have a grant in fee that binds them ; admit the adverse enjoyment for thirty years by the canal company.

(3) As to the Halseys' suits, the canal company has the right to set up the equitable right to diminish a flow in the Rockaway which may have flowed in that river twenty years, and such equitable right can only be set up in a court of equity.

(4) It is submitted that it is the province of this court to retain jurisdiction of the question, because of its public character.

The canal is a valuable public highway in which all the people are interested ; it is a unit. Take the water out of it at Dover, and it is valueless. It is admitted that the company has a right to a dam at Dover. It is admitted that, in low water, it has, for thirty years, placed flash-boards on that dam. This court can, and a court of law can not, see to it that a public work is not injured, or public travel interrupted, while, at the same time, private rights are protected. The franchise of the state is delegated for the benefit of the people, and can be as much impaired by suits treating the company as trespassers as by open violence. *High on Inj.* 318 §§ 570, 571, 572 ; *Lehigh Valley R. R. Co. v. Society &c.*, 3 *Stew.* 145.

(5) Mr. McFarlan has sought this court, and he cannot deny its jurisdiction. The canal company filed a bill against McFarlan, to enjoin him from removing the flash-boards. McFarlan filed a cross-bill, asking the court to determine "whether the company had the right to maintain, on a permanent dam, the flash-boards or some equiva-

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lent." Mr. McFarlan must patiently listen for the answer of the court. *High on Inj.* § 47; *Conover v. Mayor &c.*, 25 Barb. 531; *Crane v. Bunnell*, 10 Paige 333.

(6) It appears, by the bill and answer, that the canal, in 1845, was deepened about a foot by raising the banks, and so raising the surface of the water. This, of course, made the raising of the dam indispensable. And the defendant McFarlan admits that the flash-boards were used in 1845, and he stands by and sees this vast expenditure dependent on the elevation of the water in the canal by means of the dam, and is equitably estopped from suing the canal company for damages as trespassers. All he could ever have demanded was compensation. *Trenton Water Power v. Chambers*, 1 Stock. 471.

(7) The case is still stronger. The bill charges, and the answer admits, that McFarlan was a director of the canal company from 1830 to 1833. He remained a director until 1859, excepting out of the period the year 1848. He was a director eighteen years. The bill charges specifically, that he knew all about the use made by the company of the dam and flash-boards, and he, in no manner, denies it; that he participated in the action for the enlargement of the canal, and he does not, in any manner, deny it.

It can hardly be claimed that a director can expend his constituents' investments in effecting a public work, and then treat the work as a nuisance and the company as trespassers. Neither can it be claimed, after thirty-four years, from 1845 to 1879, that the director who attended principally to the financial matters of the company, is entitled to an offer of compensation.

(8) This decree should be reversed, because, while it was argued before the chancellor, a case involving the right to the flash-boards, but differing from this, was argued before the vice-chancellor, and erroneously, we insist, by him decided against the canal company's right, and the chancellor, having signed the decree adverse to the right of the

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canal company, as advised by the vice-chancellor, felt constrained to decide the case argued before him in the same manner, so that his two decisions should harmonize. The vice-chancellor, who did not hear the argument in the suit against McFarlan and the Halseys, virtually decided it. We submit it is the right of the citizen to have the court that hears a cause decide it.

(9) The case, in view of the charter of the company, shows the multiplicity of suits to be entirely vexatious, having no basis, and that there is nothing to be tried.

The bill avers that the canal was constructed in pursuance of the charter, and that, in constructing the canal at the *locus in quo*, the route was selected therefor, upon which route the canal was located and made, and the dam constructed, and upon which route the canal is now operated, all of which is admitted by the answer.

We have, then, the charter and its supplements admitted, that the canal from the Delaware to the Passaic, through Dover, was constructed under it; that, at Dover, the dam was located and made on the route selected.

The fifth section of the charter gives the authority to make the canal, with its works, and gives the company, with its agents, authority, from time to time, to enter upon lands, whether covered with water or not, for the purpose of surveying the route or routes for the said canal and locating the works. And when the route shall have been fixed upon, which is to be evidenced by depositing a survey thereof in the office of the secretary of state, then it shall be lawful for the company, "at any time, to enter upon and take possession of and use, all and singular, such lands, waters and streams, subject to such compensation to be made therefor as is hereafter directed" (*P. L. 1824 p. 160*). This fifth section does not require the quantity of land to be stated or the height of the dam fixed. The rule was different in *Vail v. Morris & Essex R. R. Co.*, 1 Zab. 189, and the supreme court, in *Den v. The Morris Canal and Banking Co.*, 4 Zab. 591, calls attention to the distinction. The manner in

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which compensation is to be made is fixed by sections 6 and 20. *Kough v. Darcey*, 6 Hal. 284; *Den v. Morris Canal and Banking Co.* 4 Zab. 589.

The court approve the construction thus given the charter of the Morris Canal and Banking Company in *Hetfield v. The Central Railroad Company of New Jersey*, 5 Dutch. 575. The suit provided for in section 20, being for compensation of all, direct and indirect, immediate and consequential, injury, whether by actual compensation or remote deterioration. It covers the back-water on McFarlan's wheel. It comes in the place of an assessment, and the damages covered are as extensive. *Van Schoick v. Del. & R. Canal Co.*, Spen. 253.

(2) The canal company has a charter title to the dam at *its present height*, under the power of eminent domain, and it matters not, on this point, whether the eight inches were added in 1845 or in 1857, for the charter title of the company accrued at once whenever it was. The dam was raised by the company in the exercise of a charter right, and is, as raised, a lawful structure and not a nuisance.

(3) I submit that the case shows, beyond a doubt, that the raising of the dam was in 1845, as an incident to the enlarged capacity of the canal, and this the Halseys, by demurring, admit. The company in this view sets up no lost grant, but a charter title, and the thirty years user of the dam with the flash-boards on, claiming under this title, even were it defective, makes it perfect.

IV. The provision of the charter that the company may take and hold possession under the provisions of the fifth section, subject to compensation, is clearly constitutional. Should it be claimed that it was not, we would answer—

(1) Neither McFarlan nor the Halseys can raise that question, because the dam has existed since 1828, fifty years, and at its present height since 1845, thirty-four years; unquestionably since 1857, and the presumption is that they have received their compensation.

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(2) Mr. McFarlan, in any event, could not justify tearing down an ancient dam, which had existed for thirty years, on the ground that the provisions of the law under which it was constructed were unconstitutional, particularly as that law has twice, by the supreme court of the state, when considering the very question of compensation, been decided constitutional. *Kough v. Darcey*, 6 Hal. 284; *Den v. Morris Canal*, 4 Zab. 589.

(3) The Morris canal is declared to be, and is in fact, a public highway, and *the state*, under the old constitution, could take private property for the purposes of a highway without any compensation. Property at common law was held under this reserved right in the sovereign. The right is like that of mining and navigating streams, which at common law are reserved. So the constitution of 1844, Art. XI, pl. 16, provides that private property shall not be taken for public use without just compensation, and then adds, "but land may be taken for public highways, as heretofore, until the legislature shall direct compensation to be made." But the property in this case is not taken directly by the state, it is taken by the intervention of a private corporation, and under neither the old constitution nor that of 1844 could land be taken by a private corporation without just compensation. The old constitution of New Jersey made the common law of England the law of this state, and under it a citizen's property could not be taken by a private corporation without just compensation. *Scudder v. Trenton Del. Falls Co.*, Sax. 695. The old constitution does not require that just compensation be made as a condition precedent to taking the property. And the supreme court, in the two cases last referred to, holds that not necessary. Under the constitution of 1844, because of the express provision of Art. IV, Sec. 7, pl. 9, "private corporations shall not be authorized to take private property for public use, without just compensation first made to the owners," payment of compensation is a condition precedent to the taking. And as in this case the property was taken thirty

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years ago, and has since been enjoyed, the presumption is that the condition precedent was performed. But there is no provision in the old constitution requiring compensation to be *first* made. The change in the constitution has no effect on a charter which is a contract made prior to it. The charter of the Morris Canal Company is a contract. *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518; *Zabriskie v. Hackensack R. R. Co.*, 3 C. E. Gr. 178. The constitution of the United States, Art. I, Sec. 10, provides that no state shall pass any law impairing the obligation of contracts. The constitution is a law within the prohibition of the constitution of the United States. 10 Wall. 511; *R. R. Co. v. McClure*, 18 How. 331.

Mr. H. C. Pitney, for respondents.

Let us inquire in what cases, and upon what grounds, equity will restrain suits at law. *Eden on Inj.* p. *14; 2 *Story's Eq. Jur.* § 875; *Kerr on Inj.* p. *13; *Smithurst v. Edmunds*, 1 McCart. 413.

Laying out of view, as we may, for present purposes, the causes of bills for discovery in aid of a defence at law, and for the delivering up and cancellation of instruments to which a legal defence may exist, and the like, we may say that the injunction will go to restrain actions at law only in cases where (1) a good cause of action appears at law, and (2) where no good defence at law appears, and (3) where a good equitable defence is shown.

A *prima facie* case at law must be shown, else there is no occasion to come into equity. *Kerr on Inj.* p. *17 et seq.; *Derbyshire &c. R. R. v. Serrell*, 2 DeG. & S. 353; *Arundel v. Holmes*, 4 Beav. 325; *Simpson v. Lord Howden*, 3 Myl. & Cr. 99.

A bill which shows a good defence at law is demurrable. *Kerr on Inj.* *17; *High on Inj.* § 46; *Perrine v. Striker*, 7 Paige 598; *Morse v. Hovey*, 9 Paige 197; *N. Y. Dry Dock Co. v. Am. Life Ins. Co.*, 11 Paige 384; *Minturn v. Farmers Trust Co.*, 3 Comst. 498; *Morris Canal & B. Co. v. Dennis*,

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1 Beas. 249; Wooden v. Wooden, 2 Gr. Ch. 429; Barnard v. Willis, Cr. & Ph. 85; Rawson v. Samuels, Cr. & Ph. 161, 170, 178.

The complainant attempts to set up several such equitable defences. I will consider them separately.

I. It says, that said dam was built before the year 1830 by defendant's father and predecessor in title, and has been maintained ever since by the canal company and complainant for the purposes of the canal, and that a right has, in this manner, by adverse use, accrued to the canal company and complainant to continue to maintain it. This defence is purely a legal one, available at law, and, if true, shows the complainant out of court. Complainant further says that, in the year 1845, the canal company widened and deepened its canal, and from and after that time, to the year 1875, at its free will and pleasure, and without any hindrance or denial by defendant, used flash-boards on said dam &c. To this last allegation we make two answers:

First—We say it shows a legal, and not an equitable, defence; and,

Second—It is denied by the answer under oath, and is but feebly supported by the affidavit annexed to the bill.

A *contentious* use, or one by *leave* or *favor*, will not result in any right. I beg leave to refer to my brief in the other suit between these parties, decided by Vice-Chancellor Van Fleet, and recently before this court, for the reasoning and authorities on this part of the case.

II. It sets up the pendency of a suit in chancery, brought by complainant against defendant in 1875, to restrain defendant from in part abating said dam, and says that the right to maintain flash-boards thereon is involved in that suit. To which I answer: Suppose it is; does that prevent defendant from bringing an action for damages suffered by reason of the maintenance of said flash-boards, *and also for maintaining the permanent structure at an unlawful height?*

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Even if we had ourselves filed a bill in this court to abate the dam, such suit would not have been any bar to an action at law to recover damages for its maintenance. *Carlile v. Cooper*, 3 C. E. Gr. 241; *Waters v. Cooper*, *Ibid.* But the action at law here is brought for damages caused by the *whole* structure, and not the flash-boards alone. If we show at the trial that the permanent structure has been maintained higher than complainant has the right to maintain it, we shall recover damages on that account, and prevent the acquisition of the right by force of long user. But, says complainant, you impliedly admitted, in your answer and cross-bill in the former suits, that the permanent structure was lawful. To which we reply, that our pleadings in the former suit will not bear such construction, and, if they do, they are admissions available at law, and will have as much force *there* as *here*.

III. It sets up that defendant was a director in the canal company up to 1859, and knew of certain changes made in the planes of the canal, adapted to the use of larger boats, which required the use of flash-boards on the dam, and acquiesced in such changes. This allegation (except McFarlan's directorship) is not supported by any proof.

But one of the counsel in the court below took ground not broached in the bill, and insisted that McFarlan's assumed acquiescence absolutely barred him from any action at law, and although it was admitted that he was entitled to compensation, yet he could not treat the canal company as a trespasser, so to speak; and *Trenton Water Power Co. v. Chambers*, 1 Stock. 471; and *Kough v. Darcey*, 6 Hal. 237, and the peculiar character of the canal company's charter, as pointed out in the last case, were relied upon. Now, in answer to this argument, made in writing in the court below, I have to say that it is clear that McFarlan can not be held to have given the canal company a parol license to raise the dam in question, unless he knew that they contemplated raising it, or that they were actually engaged in

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raising it, or that the change in the operation of the canal would naturally or necessarily result in raising it. See *De Busche v. Alt, L. R. (8 Ch. Div.) 315*. What he did know about it, and how far he did acquiesce in it, appears by the answer, and has been already commented upon. Without admitting any acquiescence or parol license on McFarlan's part, I proceed to consider the effect of a *parol license if it were proved as set out in the bill*.

The case of *Hetfield v. R. R., 5 Dutch. 57*, holds, and the case of *Trenton Water Power v. Chambers, 1 Stock. 471*, admits, that the supposed parol license or acquiescence is no defence at law; and see the cases cited in the dissenting opinion of Chief-Justice Whelpley, in *5 Dutch. 217*, whose views afterwards prevailed in the court of errors.

But it is contended that the parol license is good in equity after being executed, and that the action of law will be enjoined. Admitting this, for argument's sake, the question arises, *Upon what terms* will chancery enforce the parol license, and restrain the action at law? And the answer is found in the two cases cited by counsel, viz., *Trenton Water Power v. Chambers*, and *Central Railroad v. Hetfield, 3 C. E. Gr. 323*. In the first case relief was granted upon the terms of *making compensation*. In the latter case it was asked for upon that distinct ground, and the bill offered to pay what the court should deem a just compensation (*3 C. E. Gr. 325*). To the same effect, *Trenton Banking Co. v. McKelway, 4 Hal. Ch. 84*.

There is no pretence in this bill that McFarlan agreed, as was alleged in Hetfield's case, to let the canal company injure his property without being paid for it. *Then the palpable defect of the bill in this case is, that it does not offer to make compensation*. Without such offer, no equity is made out. Equitable suits to enforce parol licenses are in the nature of bills for specific performance, where the complainant must, as in all other cases, offer to do what is equitable.

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Even if complainant should offer to make compensation, this court would permit the actions at law to proceed, in order to ascertain how much damage has already been sustained. *Kough v. Darcey*, 6 Hal. 237; *Seward v. Morris Canal and Banking Co.*, 3 Zab. 219, tried at the Morris circuit twice, in which Seward finally recovered damages against the company on an ordinary declaration for damages by reason of back-water flowage caused by an increase in the height of the dam across the outlet of Lake Hopatcong. *Ryerson v. Canal Co.* 3 Dutch. 457, 4 Dutch. 97.

The effect of the 20th and 27th sections of the canal company's charter is to leave McFarlan, in this cause, just where the common law would place him, if the charter had been passed under the new constitution. His remedy is either to abate or apply to equity for an injunction, or, by repeated actions at law, to recover damages caused by back-water. The relations of the parties to each other are precisely the same as that of ordinary citizens. This has always been the view taken by the courts of this state. *Seward v. Morris Canal*, 3 Zab. 219; *Ryerson v. Morris Canal*, 4 Dutch. 97.

It seems to me that *Cushman v. Smith*, 34 Maine 248, was rightly decided, and gives the clue to a sensible construction of the canal company's charter. The power to enter and take possession before compensation made, was given upon condition that such compensation should be made *within a reasonable time, or upon demand*. Title to land so taken could not, according to the 6th section of the charter, vest in the company until after payment of the amount awarded as a compensation therefor. *And for all incidental and consequential injuries the company are made liable in damages, as often as the same may occur, to be recovered by the common law action appropriate to the case.*

Then, as to the constitutional question. The mere fact that the old constitution did not provide in terms that private property should not be taken for public purposes without compensation made, did not justify the legislature

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in attempting to give authority to a corporation to do so. The legislature had no power to give such authority, even when unshackled by written constitutional limitations. *Gardner v. Newburgh*, 2 Johns. Ch. 162-166; *Bonaparte v. C. & A. R. R. Co.*, Bald. C. C. 205, 219; *Sinnickson v. Johnson*, 2 Gr. Ch. 374, 2 Harr. 129, 142. *Southard v. Canal Co.*, Sax. 518, is a case involving the construction of the charter under consideration, as applied to a case like the present; and Chancellor Vroom would have granted an injunction as to so much of the land flowed as had not been paid for, if the canal company had not given security. Sax. 524. So, in *Society v. Canal Co.*, Sax. 157, Chancellor Vroom would have granted an injunction if the right to divert had been set up and persisted in, and would not have left the society to its remedy at law.

The charter of the Camden and Amboy Railroad Company, 2 Harr. Comp. p. 284, is much like that of the Morris Canal Company. Prepayment is not made a requisite to the right of entry and occupation (section 11), but the railroad company holds the land "subject to such compensation to be made therefor as is hereinafter directed," and the amount of the award is made a lien on the lands taken (section 13). Yet an injunction was granted in Bonaparte's case against taking possession until payment was made or secured. The rule laid down by Justice Baldwin was, that the payment of compensation must be simultaneous with the disseizin and possession. See *Cooley's Const. Lim.* 560, 561. But the increase in the dam complained of here, was made after the new constitution was adopted, which must be held to be an amendment or supplement to the canal company's charter, so far as relates to any supposed right in practice to take property without making compensation. And it was such an amendment as the people, in their sovereign capacity, had power to make. It did not "impair the obligation of the contract" contained in the charter, nor did it interfere with any vested rights. It affects only the remedy of both parties. *Cooley on Const. Lim.* pp. 285-292,

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361-367. Besides, the charter of the canal company does not authorize or contemplate additions to, or alterations of, the original structure of the canal in the nature of new works, such as are now under consideration. They are not covered by the original contract, and when the canal company attempts to execute them, it must do it according to the law of the land, which requires compensation to be made.

However, all the defendant wants is compensation—compensation for damages already sustained, and those hereafter to be sustained. If the court feels disposed to so far favor the complainant as to allow it any relief, it should be, I submit, upon the following terms, or their equivalent:

First—Payment of all costs incurred by the defendant in all the suits.

Second—An inquiry, by a jury to be impanelled in the Morris circuit, of the damages defendant has already sustained by the maintenance of the dam, and of the injury to his property hereafter to result from its permanent maintenance.

IV. The complainant asks the aid of this court to avoid multiplicity of suits, showing two suits at law by defendant, McFarlan, and six by other defendants. But the slightest consideration will show that the defendant McFarlan is not responsible for the six suits at law brought by the other defendants, and that they are improperly joined with him in this suit. There is no precedent or principle of equity for enjoining a second suit for the continuance of a nuisance, simply because the first has not yet been determined, unless the second is brought so soon after the first, and under such circumstances, as to manifest a disposition to oppress and harass. *Eldridge v. Hill*, 2 Johns. Ch. 281; *West v. New York*, 10 Paige 539. I submit, that the removal of the first suit to the federal court, after having voluntarily come into this state court to protect its rights in the premises, was a sufficient excuse, if any were needed, for the bringing of the second suit.

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There is not the least pretence that defendant had anything to do with, or knowledge of, the making of complainant's lease, or in anywise encouraged it, either actively or passively. There is absolutely no ground of estoppel stated against him in this behalf. If the canal company, at the time of the lease, had the right to throw back-water to the height it did, on our wheel and land, it could convey that right to complainant. If it did not have that right, it could not convey it to the complainant. The law is well stated, and the authorities outside this state collected, in *Bigelow on Estoppel* pp. 473-577, and especially at pp. 500-525. In England, *Freeman v. Cooke*, 2 *Exch.* 654; *Clark v. Hart*, 6 *H. of L. Cas.* 633; *Somerset Canal Co. v. Harcourt*, 2 *DeG. & J.* 596. In New York, *Brinkerhoff v. Lansing*, 4 *Johns. Ch.* 70; *Dezel v. Odell*, 3 *Hill* 215; *Corning v. Troy I. & N. Works*, 39 *Barb.* 311-321; *S. C.*, 40 *N. Y.* 191, 203; *Rice v. Dewey*, 54 *Barb.* 458. In Alabama, *Hopper v. McWhorter*, 18 *Ala.* 229; *Owen v. Slater*, 26 *Ala.* 547. In Pennsylvania, *Eldred v. Hazlett*, 33 *Pa. St.* 307. In Connecticut, *Taylor v. Ely*, 25 *Conn.* 109-119; *Merrill v. Phelps*, 34 *Conn.* 250. In New Jersey, *Campbell v. Smith*, 3 *Hal.* 140, 182-4; *Philhower v. Todd*, 1 *Stock.* 312; *Erie Railway v. D. L. & W. R. R.*, 6 *C. E. Gr.* 289, 290; *Den v. Richman*, 1 *Zab.* 395-403.

A word in reply to argument in the court below, as to multiplicity of suits as against both sets of defendants. The equity claimed to arise out of McFarlan's three suits, is disposed of by *Eldridge v. Hill*, and that line of cases. No declaration was filed in the first suit, and complainant is entitled to a nonsuit. Surely there is no vexation in such a suit. Where the litigation is between two individuals for a continuing nuisance, the bringing of successive actions at law is a recognized mode of effecting the abatement of the nuisance. *Angell on Watercourses* § 402; 3 *Bla. Com.* 220; *Caruthers v. Fillman*, 1 *Hayw. (N. C.)* 399. And where, as here, the complainant is claiming an easement by grant or adverse user, as against the natural right, no injunction will

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go until the complainant in equity has achieved a decided success at law. *Carlile v. Cooper*, 6 C. E. Gr. 576. On the contrary, the injunction goes in favor of the plaintiff at law, on the ground that his remedy there is inadequate.

The vice of the argument by which it was attempted to connect and weld McFarlan's with Halseys' suits, is twofold.

First—As before shown, the right, the exercise of which is claimed as against McFarlan, is different from the right, the exercise of which is claimed against the Halseys. One is to *divert*, the other is to *dam back*.

Second—The identity of *right* requisite to give equity jurisdiction to collect and consolidate several actions at law, must be identity in the *origin and foundation* of the right, rather than in the *nature* of the right. This principle is applied in cases where there is a contention between one person on one side and several on the other, and many suits result, all involving one right. The distinction between the case of several suits between two individuals for a continuance of the same injury, and the case of several suits between one individual on one side and several persons on the other, all involving the same questions, is radical, and must not be lost sight of. *Crews et al. v. Burcham*, 1 W. Bl. 352; *Sheffield Water Works v. Youmans*, L. R. (2 Ch. App.) 8; *Schuyler Cases*, 17 N. Y. 603.

The opinion of the court was delivered by

DEPUE, J.

The Morris Canal & Banking Company was incorporated in 1824. In 1828, it constructed its canal from the river Delaware to the Passaic. In 1871, the canal and all the franchises and property of the company were leased to the Lehigh Valley Railroad Company. The summit level of the canal is near Lake Hopatcong, which furnishes the principal supply of water for the eastern division of the canal. At Dover, in the county of Morris, the canal crosses

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the Rockaway river. The crossing is effected by discharging the waters of the canal into the river by means of a lift-lock, and admitting, through a guard-lock on the other side, sufficient water into the lower level to maintain the water therein at a height sufficient for the navigation thereon. To accomplish that purpose, the company placed a dam across the river. The dam, as a permanent structure, was erected when the canal was built, in 1828. In 1845, the company enlarged its canal, and increased its capacity, so as to admit the passage of boats requiring a greater depth of water; and, in order to obtain a suitable depth of water at the place of crossing, and in the lower level, the company placed, on the top of the dam, flash-boards, held in position by iron pins or bolts, to be kept there, as necessity might require, during the boating season. The controversy which has given rise to this litigation, relates to the company's right to the use of these flash-boards.

McFarlan is the owner of a rolling-mill, situate on the Rockaway river, above the canal company's dam. His mill is driven by the waters of the river, which, after passing his water-wheel, are discharged into the river above the canal dam. The Halseys and Mrs. Beach are the owners of a grist-mill, saw-mill and forge and bloomary, situate on the Rockaway river, below the canal company's dam, which works are also driven by the waters of the river. The other defendants, Van Winkle and Hoagland, were lessees of the Halsey mills and forge.

McFarlan, conceiving himself to be injured by back-water upon the wheel of his rolling-mill, sued the complainants to recover his damages. The Halseys and their tenants also brought suits to recover damages for the diversion of the water from the mills and forge, below the canal dam. Thereupon the complainants filed this, a bill of peace, to enjoin the prosecution of said suits, and for a determination of the rights of the parties respectively in one suit, to be prosecuted under the direction of the court of chancery.

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Upon the filing of the bill, a temporary injunction was granted.

The Halseys demurred to the bill for multifariousness. McFarlan filed an answer, in which the objection to the bill for multifariousness is also expressly taken.

The chancellor, upon hearing upon bill, answer and demurrer, dissolved the injunction, and dismissed the complainant's bill.

The particulars connected with the institution of the said several suits are fully stated in the chancellor's opinion. They need not be repeated here. Suffice it to say that, at the time this bill was filed, eight suits were being prosecuted—two by McFarlan, two by the Halseys, and two by each of their tenants. These suits were all brought in the supreme court of this state. The first of them, brought by McFarlan, was commenced December 30th, 1876, and claimed damages from April 1st, 1872, to the commencement of the suit. The first of the Halseys' suits was begun September 21st, 1876, and, on the same day, the first of the suits of Van Winkle and Hoagland were begun. All these suits the complainant (it being a foreign corporation) removed to the circuit court of the United States for the district of New Jersey. Thereupon, each of the plaintiffs in the said actions brought a new suit, in the supreme court of this state, for damages accruing after the time of the commencement of the first suit.

For the duplication of these actions the complainant is itself responsible. If the suits first commenced had been allowed to remain in the state courts, and fresh suits had been brought by the same parties for damages accruing subsequently, and arising from the same cause, the defendant in such actions could have obtained a consolidation of all the actions brought in the name of the same plaintiff, by application to the court, under sections 121 and 289 of the practice act (*Rev. pp. 867, 893*). And although the several suits be prosecuted in different courts, a court of law may, in virtue of its control over its own proceedings, in

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its discretion, order a stay of proceedings in suits pending before it, until the rights of the parties are settled by the result in one action. The appropriate relief against successive suits by the same plaintiff for damages arising from an injury which is continuous, is, by application for the consolidation of actions, or for a stay of proceedings, and not by bill in chancery, unless the right in controversy has once been determined adversely to the plaintiff. *Eldridge v. Hill*, 2 Johns. Ch. 281; *Thompson v. Engle*, 3 Gr. Ch. 271.

The question, then, will be, whether four suits pending (one by McFarlan, one by the Halseys, one by Van Winkle and one by Hoagland) will, under the circumstances of this case, justify resort to a bill of peace.

A bill of peace, enjoining a litigation at law, is allowable only when the complainant has already satisfactorily established his right at law, or where he claims a general and exclusive right, and the persons who controvert it are so numerous that the endeavor to establish the right by actions at law would lead to vexatious and oppressive litigation, and renders an issue under the direction of the court indispensable to embrace all the parties concerned, and to avoid multiplicity of suits. *Tenham v. Herbert*, 2 Atk. 483; *Eldridge v. Hill*, *ubi supra*.

✱ The object to be attained by resort to a court of equity, in such cases, is, to obtain a final determination of the particular right in controversy, as between all the parties concerned, by a single issue, instead of leaving the right open to litigation by separate suits brought by each of the parties in interest. To justify a bill of peace, therefore, there must be in dispute a general right in the complainant, in which the defendants are interested, of such a character that its existence may be finally determined in a single issue. It is not indispensable that the defendants should have a co-extensive common interest in the right in dispute, or that each should have acquired his interest in the same manner, or at the same time, but there must be a general right in the complainant, in which the defendants have a

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common interest, which may be established against all who controvert it, by a single issue. 7

A reference to a few of the prominent cases will illustrate the principles on which bills of peace are founded. In *Sheffield Water Works v. Yeomans*, L. R. (2 Ch. App.) 8, a bill was filed by the complainants against Yeomans and five other defendants, and all other persons interested in certain certificates, which the bill prayed might be decreed to be void. The bill stated that a reservoir, belonging to the complainants, had burst, occasioning an inundation, whereby many persons lost their lives, and the property of very numerous persons was damaged; that, by act of parliament, commissioners were appointed to inquire into the damages occasioned by the inundation, and, where any claim of damages was assented to by the company, or assessed by the commissioners, the costs of the claimants were to be paid by the company, and the commissioners were to certify accordingly, for which costs, if not paid within a limited time, judgment might be entered against the company. The commissioners made out fifteen hundred certificates, which they lodged with Yeomans, who was town clerk. These certificates the complainants alleged to be invalid. The bill was filed to enjoin the delivery of the certificates, and for a decree that they should be delivered up to be cancelled. The defendants demurred. In overruling the demurrer, Vice-Chancellor Kindersley said: "There were in this case a number of persons, each alleging that he was entitled, as against the company, to be paid a certain sum, to be ascertained, in respect of costs; each claim was founded on the same state of circumstances, and what would be successful in one case, would be so in all; each insisted that he was entitled to have out of the custody of the town clerk these documents, in order to adopt the process under the act to recover the costs, that is, to go to the taxing-master and get judgment entered up, and issue execution; it was, therefore, the case of one body against a number of separate individuals, each claiming, as against

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the one body, a certain right, the right being the same in all, and the same reasons and arguments applying to all; now, the question was, whether this was not precisely a case for a bill of peace, *quoad* the form and nature of the bill: where there were a number of persons claiming as against one, or one person against a number, and where all were claiming alike, that was a case for a bill of peace." On appeal, the decree of the vice-chancellor was affirmed, for the reason that the rights of the numerous claimants all depended upon the same question—the validity of certificates sealed under the circumstances stated in the bill.

The case of *The N. Y. & N. H. R. R. Co. v. Schuyler*, 17 N. Y. 592, is another apt precedent on the same subject. The complainant was a corporation, whose capital stock was limited by its charter to \$3,000,000, represented by thirty thousand shares of stock. The bill charged that Schuyler, the president and transfer agent of the company, had fraudulently over-issued certificates of stock for his own private purposes, amounting to nearly \$2,000,000. Three hundred and twenty-six persons were joined in the suit as defendants, for the reason that they were holders of certificates of stock fraudulently issued. It was alleged that some of the defendants took these certificates knowing they were fictitious; some with reason to believe so; some on usurious contracts; many under circumstances which should have put them on inquiry, and many others under circumstances and upon considerations unknown to the complainants. Some of the defendants had brought suit, and other suits were threatened. The bill joined Schuyler and all the alleged owners and holders of this over-issued stock as defendants. It prayed that the certificates might be decreed illegal and void, and be surrendered up and cancelled, and that those who had sued the company might be enjoined from further proceedings therein; and that those who had not sued might be enjoined from bringing actions. On demurrer by one of the defendants, who was the holder of some of the spurious stock, the bill was held

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to have been properly filed against all the defendants, for the reason assigned by Comstock J., in pronouncing the judgment of the court, that there was a single interest in the complainants directly opposed to the interests of all the defendants. The common point and center of the litigation was the stock, property and franchises of the corporation in which the defendants claimed specific shares and proportions, as holders of the false certificates. The rights claimed by the defendants were distinct, because they rested upon separate instruments as the evidence thereof; but they were of precisely the same nature, as they turned upon the same question, and were a cloud upon the same estate. Each certificate was a false muniment of the holder's title to a particular interest in the corporate estate vested as a unit in the corporation, but equitably belonging to the holders of its actual stock. And all the parties could be united because there was such a unity in the controversy with them all as to render it proper that they should be joined in a single suit.

Fellows v. Fellows, 4 Cow. 682, is a case possessing the same characteristics as the one last cited. It was a bill against the several holders of property fraudulently transferred in separate parcels to each, and the bill was sustained because there was one connected interest in all the defendants centering in the point in issue in the case, one common subject of litigation on which the several titles of the defendants depended, which could be determined, and the whole litigation disposed of in the one suit, the result of which would settle the rights of all the parties.

On the other hand, where the interests of the several defendants are entirely distinct and unconnected, and do not present one common subject of litigation, though they relate to the same claim of right in the complainants, such defendants cannot be joined in the same suit. Thus, a bill will not lie against the several tenants of a manor for quit-rents, for the reason that no one issue could have tried the cause between any two of the parties, and no principle

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would justify the bringing in of two different tenants of distinct estates to hear each other's rights discussed. *Bouverie v. Prentice*, 1 Bro. C. C. 200. If a copyright be infringed by different booksellers, the owner of the copyright can not join all the wrong-doers in the same bill, as the rights of each of the parties stand upon a distinct ground. *Dilly v. Doig*, 2 Ves. 486.

✱ In *Rayner v. Julian*, 2 Dick. 677, Kenyon, M. R., puts the case of the sale of an estate in lots to different persons, and says that the vendor could not include all the purchasers in one bill for specific performance, as each party's case would be distinct, and depend on its own circumstances. And in *Brookes v. Lord Whitworth*, 1 Madd. 85, a demurrer for multifariousness on that precise ground, was allowed.

Whaley v. Dawson, 2 Sch. & Lef. 367, is a case where a demurrer was allowed, although the complainant had grounds for relief against all the defendants, with respect to the same estate; for the reason that there was no common subject matter of litigation in which all the defendants were interested, and one set of defendants could not be involved in the litigation of a question that related exclusively to the other.

Indeed, the rule with regard to multifariousness, whether arising from the misjoinder of causes of action, or of defendants therein, is not an inflexible rule of practice or procedure, but is a rule founded in general convenience, which rests upon a consideration of what will best promote the administration of justice without multiplying unnecessary litigation on the one hand, or drawing suitors into needless and unnecessary expenses on the other. *Story's Eq. Pl.*

✱ § 539. Enough has been said to show that, in allowing or disallowing objections of this kind, the courts are guided by the consideration whether there is a subject matter in dispute, in which all the defendants are interested, which is capable of being determined in a single issue, and the determination of which, in that method, would not involve the defendants severally in the needless expenses of the litiga-

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ion of matters in which they have no concern. The authorities on this subject are quite numerous. A citation of a few of them, in addition to the cases already referred to, is all that is proposed. *Mayor of York v. Pilkington*, 1 Atk. 282-4; *Ward v. Duke of Northumberland*, 2 Anst. 469; *Weale v. West Middlesex*, 1 Jac. & W. 358, 369; *Campbell v. Mackay*, 1 Myl. & Cr. 603; *Powell v. Earl of Powis*, 1 You. & Jer. 159; *Com'rs of Sewers v. Glasse*, L. R. (7 Ch. App.) 456: *Same v. Gellatly*, L. R. (3 Ch. Div.) 610-615; *Brinkerhoff v. Brown*, 6 Johns. Ch. 139; *Story's Eq. Pl.* §§ 271-286, 530-539; *Mitford's Eq. Pl.* 182; *Cooper's Eq. Pl.* 182.

The question has generally arisen on demurrers to bills in causes of purely equitable cognizance. But in this respect there is no difference between such bills and bills of peace. A bill of peace which shall draw within equitable cognizance causes of action which are purely legal in their character, must conform to the rules and principles of ordinary equity pleading, and, in addition thereto, must possess another element arising from the number of the parties interested and the multitude of actual or threatened suits. In such cases there must be such a unity of interest on the one side or the other, as would justify a joinder of the parties in causes of purely equitable cognizance. 17 N. Y. 608, *Comstock, J.*

Passing by the small number of persons who appear to be in anywise interested in this controversy, and regarding only the substance of the bill upon its merits, it is plain that this bill can not be maintained.

In considering whether there is a subject matter in dispute in which the defendants are interested, that is common to all the parties, and upon which their several suits at law hinge, their actions must, for the purposes of this record, be grouped into two classes, those brought by McFarlan being placed in one class, and those by the Halseys and their tenants in the other. The only fact that is common to the suits of the parties respectively is, that the company erected its dam, and placed flash-boards upon it, and that the parties

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respectively claim that an injury resulted therefrom which gave to them severally a legal cause of action. But the right of the company to erect its dam, and place flash-boards upon it, and thereby appropriate the waters of the Rockaway river to its use for its canal, to the injury of private individuals, is not a matter in actual dispute. The company, in virtue of the terms of its charter, had authority to construct its dam and appropriate the waters of the river to the uses of its canal, without being wrong-doers, subject only to compensation for injuries to individuals, to be recovered by appropriate actions at law. *Lehigh Valley R. R. Co. v. McFarlan*, 4 Stew. 706. No issue at law is necessary to determine that question, nor could its determination, one way or the other, affect the right of the defendants to prosecute their actions. The company's charter, which authorizes the appropriation of private property to its use without compensation first made, also gives individuals who are injured, a right of action to recover compensation for their injuries. Whether the actions brought by the defendants are in proper form, and the principles upon which damages are to be assessed in case the issues are brought to trial, and a good cause of action shown, are questions of law to be decided by the courts in which the actions are pending.

Nor does there appear, by the pleadings, to be such a unity, either in the grounds on which the actions of the defendants are rested, or in the defences proposed, as would make a bill of peace and an issue thereunder, the appropriate method of settling the questions involved. McFarlan claims that he was injured by back-water arising from the increase in the height of the water in the pondage of the dam. The Halseys, and those who represent them, claim that their injuries were caused by the diversion of the waters of the river for use on the lower level of the canal. The Halseys suffered no injury from the increase in the height of water above the dam, and McFarlan's injury is in nowise attributable to the abstraction of water from the


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river for use upon the lower level of the company's canal, and which may, to some extent, have been caused by the mode in which the lock and gates at the other extremity of the level were managed. The causes from which the injuries to the parties respectively resulted, instead of being coincident, are divergent. Holding the water at an increased height in the dam, or even in the lower level of the canal, would occasion no injury to the Halseys as the owners of water rights lower down on the stream, and McFarlan is not, in any manner, interested in the quantity of water abstracted from the river which flowed through the lower level, and was discharged into the company's canal beyond. If the flash-boards should be removed, and the back-water be thus withdrawn from McFarlan's premises, that might not prevent the diversion of which the other defendants complain. And, if the guard-lock at the outlet from the river, or the lock and gates at the other end of the level, should be so managed as to avoid the diversion from the river of more water than is brought into it by the canal from above, and thus the grounds of complaint by the Halseys should be removed, the injury to McFarlan by back water would still continue, if the dam was maintained at its present height. The trial of an issue in which McFarlan and the Halseys were the parties on one side, involving the causes of their injuries respectively, would necessarily lead to the introduction of evidence and the investigation of issues pertinent to the complaint of the one party, and wholly irrelevant to that of the other; and in some respects their interests would necessarily clash. On the trial of such an issue, it would be to the interest of McFarlan to show the great volume of water discharged over the dam, as bearing on the height to which the water was held above the top of the dam, and the interests of the Halseys would be promoted by showing precisely the reverse.

The proposed defence to the McFarlan suit is, that the dam was originally erected by the license and consent of

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McFarlan's ancestor, from whom he derived title, and that McFarlan was himself a director of the Morris Canal & Banking Company in 1845, when the canal was enlarged, and was fully cognizant of the affairs of the company, and participated in the actions of the company in increasing the capacity of its canal, and the reconstruction of the locks and planes whereby an increase of the height of the water at the crossing of the canal, over the Rockaway river, by the use of flash-boards on the top of the original dam, became necessary; and that he is equitably estopped from complaining that the use of flash-boards, and the consequent flooding of his mill by back-water, was without his consent. On the other hand, to the Halseys' suits, and those of their tenants, the defence is, that no more water was taken from the river than was brought into it by the canal from its supply at Lake Hopatcong, and that the company obtained from Joseph Jackson and John D. Jackson, who were formerly the owners of the premises, a grant in the nature of a perpetual license to maintain said dam and flash-boards, which grant or license, by lapse of time, has become lost. The defendants have no common interest in any of these defences, nor is the other defence of a prescriptive right, which the complainants propose to make to all the suits, one in which the defendants have a common interest. The theory on which title by adverse possession or prescription rests is, that there has been a possession or enjoyment for the full period of twenty years, continued and uninterrupted, adverse to the interest of the true owner, in which he has acquiesced, on which the law presumes a grant which has been lost. A claim of title or right derived from such a source is individualized and personal as against the owner of each separate parcel of land to which such a claim of title or right is made. The possession may have been permissive, and, therefore, not hostile to the owner of one parcel and not as to the other. It may have been interrupted by the owner of one parcel so as to destroy the continuity of possession and enjoyment of



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one parcel and not of the other; and personal disabilities may have suspended the operation of the statute as to the one and not as to the other. It is manifest that the trial of all three distinct issues in one issue, under the direction of the court of chancery, would be impracticable.

The decree of the chancellor, dissolving the injunction and dismissing the bill, should be affirmed.

Decree unanimously affirmed.

ELIZA A. GRAVES, appellant,

v.

EBURN H. COUTANT, respondent.

1. If a person purchases land of a vendee, with notice of the vendor's equitable lien for purchase-money, such purchaser will be charged with the same trust as the vendee.

2. The defence of a *bona fide* purchaser must be clearly and unequivocally set up in the answer, with the particulars of the purchase, and must be distinctly proved.

3. The claim of a vendor's lien for purchase-money, is one of peculiar equitable cognizance, and a vendor having no judgment or execution which binds the land, does not stand in the position of a creditor at large without remedy against the land in equity.

4. The recovery of a judgment at law for the unpaid purchase-money, will not merge or affect the vendor's lien.

5. The limitation of actions, if it be a defence against a vendor's lien, will not run while an action is pending in another state for the recovery of the debt, and the time of limitation must date from the judgment.

6. Where, by the law of a state, a vendor's lien for purchase-money is recognized, a discharge in bankruptcy of the vendee or his purchaser with notice, will not discharge the land.

NOTE.—Whether the statute of limitations applies to a contract implied by law, see *Jordan v. Robinson*, 15 Me. 167; *Wickersham v. Lee*, 83 Pa. St. 422; *Gowers's Case*, 3 Mont. & A. 172; *Townsend v. Townsend*, 1 Bro. C. C. 551; *Skeet v. Lindsay*, L. R. (2 Ex. Div.) 314. Whether it applies to a suit for specific performance of a contract for the sale of

CHAPTER I. — THE STATUTE.

On appeal from a decree entered by the master Henry C. Tracy, who stated orally the following reasons in the decree:

THIS IS A BILL filed by Edward E. Constant against John Anthony Constant seeking to enforce certain liens in the judgment of the court of Sessions and also all provisions of laws and—such of them as have been made—in the course of the judgment in the judgment of Justice & Judge—such provisions as Mr. Constant in the Supreme Court of the State of New York seeking enforcement of the judgment of the Sessions Court.

The facts upon which the proceedings before the court are based appear to be in this order, and briefly as follows: In 1882, Mr. Constant conveyed to Mr. Graves the interest of the defendant in the stock and comprising the capital stock of the defendant part of the property in question and conveyed according to estimate to the said certain lands in Bergen Neck in the county of Hudson of considerable value. The consideration money expressed in the deed is \$30,000. Shortly afterwards some dispute arose between Constant and Graves with regard to the value of certain parts of the property, and with regard to the payment of the purchase-money. The particulars of that dispute I have not gone into very carefully, but the result was that shortly after the conveyance, an action was brought by Graves against Constant, in the supreme court of the state

lands, see *Wadhams v. Wadhams*, 4 Ind. Eq. 305; *Smith v. Smith*, 1 McMull. Eq. 125; *Hennings v. Zimmerman*, 4 Tex. 159; *Ferry v. Commonwealth*, 22 Tex. 91; *Clifford v. Tink*, 4 Va. 491; *Brown v. Ford*, 46 Cal. 7; *Lowell v. Kim*, 50 Cal. 646; *Peters v. Delaplaine*, 49 N. Y. 382; *Evans v. Evans*, 2 Rich. 112; *Wright v. Leclair*, 3 Ind. 221; *Gregory v. Baker*, Rich. Eq. Cas. 235; *Morris v. Blake*, 1 Ball & B. 55; *Phillips v. Gibson*, L. R. 6 Ch. 428.

In the following cases the statute has been held applicable to suits to enforce vendor's liens: *Morse v. Anders*, 14 Ark. 628; *Lathrop v. Tapscott*, 28 Id. 267; *Casper v. Lowery*, 54 Ga. 198; *Trustees v. Wright*, 11 Ill. 603, 12 Id. 492; *Trotter v. Ervin*, 27 Miss. 772; *Littlejohn v. Gordon*, 32 Miss. 235; *Avent v. McCorkle*, 45 Miss. 221; *Borst v. Corey*, 15 N. Y. 505; *Fullerton v. Spring*, 3 Wis. 667; *Sheratz v. Nicodemus*, 7 Yerg. 9; *Ray v.*

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of New York. To that suit Coutant filed a counter-claim, or set-off, setting up, among other things, that Graves was indebted to him for a part of the purchase-money on the sale of the Hudson county property. That suit went on to trial and was heard before Judge Brown of the supreme court, and, some time previous to the 1st of March, 1860, Judge Brown made a finding of facts, which is found on pages 16 and 17 of the judgment roll of the supreme court offered in evidence, which is in the nature of a special verdict, by which he found that the Hudson county land had not been paid for, and stated the amount of money due on it. There was no judgment entered at that time, because Judge Brown ordered a re-argument on some other minor matters. Subsequently counsel were heard on those matters, and on the 5th of March, 1860, judgment was rendered in favor of Coutant, against Graves, for \$6,344.10 besides costs. At or about the time of the rendering of that judgment, Graves conveyed the property in Hudson county, to Jacob R. Wortendyke, who conveyed it back to his wife, the defendant, the nominal consideration in both deeds being \$1,000. An appeal was taken from the judgment in New York, to the general term of the supreme court, which affirmed the judgment, some time in 1863. A re-argument was ordered, and the judgment was again affirmed. It was twice heard in the supreme court, and both times the judgment was affirmed. The last affirmance was in 1865. An appeal was then taken by Graves to

Goodman, 1 Sneed 586; *Gudger v. Barnes*, 4 Heisk. 570; *Gibbs v. Holmes*, 10 Rich. 484; *Toft v. Stephenson*, 7 Hare 1, 5 DeG. M. & G. 735.

In the following cases the statute has been held not to be applicable to a suit to enforce a vendor's lien: *Driver v. Hudspeth*, 16 Ala. 348; *Relfe v. Relfe*, 34 Ala. 500; *Moreton v. Harrison*, 1 Bland 491; *Leinhart v. Forringer*, 1 Pa. 492; *Evans v. See*, 23 Pa. St. 88; *Magruder v. Peter*, 11 Gill & Johns. 217; *Hopkins v. Cockerell*, 2 Gratt. 88; *Hanna v. Wilson*, 3 Gratt. 243. See *Belknap v. Gleason*, 11 Conn. 159.

Query, Would an acknowledgment of the existence of a vendor's lien extend or revive it? See *Toft v. Stevenson*, 5 DeG. M. & G. 735; *Lingan v. Henderson*, 1 Bland 236; *Wheeler v. Smith*, 2 Jones Eq. 408.—
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the court of appeals of New York. Pending that appeal, in 1868, Graves, who had previously been a man of means, became a voluntary bankrupt. In 1871 he was discharged from his debts as a bankrupt, and in 1873 died.

In 1875, the case in the court of appeals, of Graves, appellant, and Coutant, appellee, was reached, and the appeal dismissed, and that judgment of dismissal was made the judgment of the general term, as appears by the judgment record. Shortly after the rendering of that judgment, the complainant filed his bill herein, in this court, setting out these facts, and claiming a decree in the form stated, and relying particularly on two grounds. I will consider those two grounds separately. First, he says, he is a general judgment creditor, not a judgment creditor in this state, but a general creditor by a debt which has been absolutely fixed by the judgment of a sister state, and that, as such judgment creditor, under the peculiar circumstances of this case, he has a right to come into the court of chancery, and take this property, of which he alleges Mrs. Graves is not a *bona fide* purchaser, but which was conveyed in fraud of this very debt, and appropriate it to the payment of his debt.

A very ingenious argument was addressed to me, on the part of the complainant, in support of this contention, and authority has been cited from sister states, and the case has been stated to be an exception to the rule laid down by Chancellor Runyon, in the case cited of *Davis v. Dean*, 11 C. E. Gr. 436, where it was held that a man must have a judgment and execution in this state before he can reach lands in New Jersey. I am unwilling to follow the argument of the counsel for the complainant on that point. I think it is founded on a misapprehension of the law. I think this case is an exception to the case just referred to, in that here the judgment debtor is dead, and, under its peculiar circumstances, there can be no other remedy. The creditor may be said to have exhausted his remedy at law, and, unless this court can relieve him, he is without remedy. But the

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difficulty is, that I do not know of any equity in New Jersey by which the court of chancery can be called upon to appropriate land for the payment of a debt of a decedent. Judgment liens upon land in New Jersey are acquired by virtue of the statute which requires judgment and execution. And where they are sold to pay the debts of a decedent, they are sold by virtue of the statute. And, although there are abundant authorities from sister states in favor of complainant's contention, I do not think they apply here, whatever may be their soundness in the states where they were made. I will state to counsel, further, that I have an impression—which I have not followed very far—that the court of chancery of this state did at one time assume the jurisdiction of applying the lands of decedents to the payment of their debts, in the course of the administration of their estates.

In 1743, the colonial legislature passed an act, found in *Allinson 129*, by which, for the first time, I believe, in the state of New Jersey, land could be subjected to the payment of debts or judgments, and the first section of that act declares, in round terms, that land shall be an asset for the payment of debts, in all respects, the same as personal property. In 1784 the orphans court act was passed, and the eleventh and twelfth sections of that act provided for the sale of lands to pay debts of decedents, where one of the heirs or devisees was a minor. In 1786 an act was passed which included all lands, whether of minors or not. In the meantime, the act of 1743 remained in force, until 1799, when it was repealed, and substituted for it was Judge Paterson's act, which provides for the sale of land by sheriffs &c.—substantially our act, as it remained in force many years. But I happen to know that just about that time the court of chancery *did* assume jurisdiction to apply lands of a decedent to the payment of his debts, by a bill filed for that purpose. I have a case in my mind which arose in Morris county, the case of John Jacob Faesch, but whether the bill was filed just before or just after the act of 1799, repealing the act of 1743, I do

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not know. I have an impression that possibly the court of chancery, under the very wide jurisdiction it assumed under the colonial authority, and by virtue of the first section of the act of 1743, may have assumed that sort of jurisdiction, but I am not aware that it has ever been exercised since. In fact, I think the settled rule now is, that where a man dies, leaving an estate of land, you can only get at that to pay debts, if you have not a judgment and execution, through the orphans court. However, I do not pretend to have followed the subject out; I do not know that I am fitted for it; I am not an historical expert of New Jersey law.

I decline to advise a decree on the first ground.

On the second ground, however, I think quite differently. The second ground on which the complainant asks a decree is, that the debt evidenced by the judgment in New York, was for a part of the purchase-money on the sale of the Hudson county land by Coutant to Graves, and that a lien—vendor's lien—resulted, which he is still in a position to enforce.

And first, now, whether or not there is proof that this debt, on which the complainant founds his equity in this case, was a debt resulting from the sale of that land—and I think that must be held as conclusively proved in this case—the finding of Judge Brown in the New York suit, which is in the nature of a special verdict, so finds. He particularly states and finds that Graves did not pay for that land, by any of the transactions between the parties. The pleadings clearly raise the issue, and it is so found by Judge Brown. Independent of the parol evidence in this case, I think there is sufficient to show the debt is a debt for consideration money unpaid. Then we have, in addition to the record of the New York judgment, the evidence of the complainant in this suit. The evidence of the complainant has been criticised in this respect—that it is very loose and unsatisfactory. It may be open to that criticism, but I do not know that that helps the defendant at all. The complainant is not called upon to retry the case in New York.

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It was a very complicated case, and it proved to be a very difficult thing to determine how the purchase-money was settled between the parties at the time; and the complainant, probably, never understood it himself, and certainly could not be expected to explain it without a refreshment of his memory, when put upon the stand in this case, after so long a time; and what he does swear to in substance is, that the judgment there recovered, was for the purchase-money of this property, and that, in point of fact, it was not paid; he cannot tell how, or explain how, but I think I must find in that way.

If, then, this is a debt for purchase-money, it follows, I think, that the complainant is entitled to relief, unless some of the defences set up prevail, and I will consider them in detail.

The first defence set up is that of "*bona fide* purchaser for a valuable consideration." I believe my friend, Mr. Emery, did not press that very strongly. I think it must fail. The complainant, in his bill, makes out a clear *prima facie* case of vendor's lien, and then he calls on the defendant; he charges the defendant with not being a "*bona fide* purchaser," and calls upon her, in his bill, to set out what she did pay, and how she paid it. That casts the duty on the defendant to set out in her answer, fully and in detail, how and what she paid. That, I think, she fails to do. She does, indeed, pretend to say that she paid \$1,000, but that is no consideration for the property. I think she stated herself, out of court, so to speak, on this point: "And this defendant, further answering, says that she did pay to the said Jacob R. Wortendyke, through her agent, the consideration in said deed expressed; that she had money of her own, in her own right, at the time of her marriage with the said Rosewell Graves, and that afterwards, and during her marriage, she derived from her father's estate a large sum of money, which was entrusted to her husband, and out of which her husband, the said Rosewell Graves, was to, and did, pay for said property; and the funds so used to pay for

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said property, were the funds of this defendant, as her own separate estate."

Now, as I understand that, it is an allegation that Graves bought the property for her, and paid complainant for it, so far as he did pay, with her money. If she did not pay for it in full, she was really the grantee. She cannot be in the position of a "*bona fide* purchaser," as against the very person from whom she purchased, who claims the vendor's lien. That allegation in the answer would be a good answer to a general judgment creditor, if it be the truth, but not on the question of vendor's lien. Then there is a variety of other evidence, which it is not necessary for me to refer to in detail on the subject, and no satisfactory explanation is given to show why the conveyance was made just after Judge Brown had announced his decision, giving it substantially in favor of the defendant Coutant, the complainant in this case. And the whole circumstances show it was done through her husband, who knew about these matters, and was her agent. I think that defence fails.

The next defence set up is the discharge in bankruptcy. It is not pretended that a mortgage existing at the time of the discharge in bankruptcy, or any actual existing lien, would be destroyed by the proceedings in bankruptcy, or by the discharge of the debt as a debt; but the defendant put herself on the ground that a vendor's lien is not of that character, that it is not a lien "*ex proprio vigore*," but is a lien created by the court of chancery after bill filed for that purpose. And counsel quotes, in support of that view, an extract from Judge Story's opinion in *Gilman v. Brown*, 1 Mason 191, 221: "The vendor's lien is a mere creature of a court of equity. It is, in short, a right which has no existence until it is established by a decree of the court in a particular case, &c."

Now, it may be very presumptuous for an obscure individual like myself to dissent from Judge Story in anything that he says, but I must do it. I think that opinion of Judge Story undoubtedly wrong, and founded on a misap-

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prehension of equity. What is an equity? A right arising out of certain facts. A man sends his agent with money to buy an estate; the agent takes the deed in his own name instead of the name of his principal; an equity at once arises out of those facts in favor of the principal to have the title conveyed to the principal by the agent, of that land of which, in equity, the principal is the owner all the time; he is the owner from the first. A man contracts in writing with another to purchase an estate; on the day named he pays the money, and for some reason or other the deed is not made; then an equity arises out of the facts that he shall have the deed; it arises at once out of the facts. An equity is never created by the court; it exists independent of the court. All the court of chancery does is to recognize and enforce it. It is a solecism to say the court of chancery creates an equity. Then a lien for purchase-money—what is a lien for purchase-money? It is not a lien in the strict sense of the word; at law a lien cannot exist without actual possession. It is a right the pledgee has in the thing pledged, to keep possession until some duty is performed. An equitable lien is a right which a person out of possession may have to the thing, and it is simply a right to come into the court of chancery, and have that right enforced, applied, and to take the fruits of it, which he cannot have without the aid of the court of chancery; and it arises out of the facts and circumstances of the case. Now, where a man delivers a deed for property, and does not get the consideration money, an equitable lien arises at once in his favor, according to my view of it, of exactly the same nature, as far as the court of chancery is concerned, as if he had taken a mortgage in writing, sealed and delivered, and it is so held by Chancellor Zabriskie, in *Armstrong v. Ross*, 5 C. E. Gr. 109. There, as you no doubt recollect, the chancellor held that a void mortgage given by a married female for purchase-money, was good and enforceable in equity as a vendor's lien, and had existed, of course, from the time it was given. In such cases the court says that it

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is contrary to equity and natural justice for the vendee to keep the land without paying the purchase-money, and it seizes upon the land in his hands, and applies it to the payment of the purchase-money. This right to come into this court, and ask such aid from the court, is called a vendor's lien.

Therefore, without enlarging further on this point, I would say that I think the lien existed as soon as ever the deed was given, and the money was not paid. I may say, here, that while this equitable right of vendor's lien has been differently treated and recognized in different states of the Union, there is no state in the Union where it has been put on higher grounds, and treated as a greater favorite, than by the courts of the state of New Jersey, and it has always been treated as a substantial right. I refer to *Van Doren v. Todd*, 2 Gr. Ch. 397, a case somewhat in point; *Brinkerhoff v. Van Sciren*, 3 Gr. Ch. 251; *Corlies v. Howland*, 11 C. E. Gr. 311; *Dudley v. Dixon*, 1 McCart. 252. I think, therefore, that the right of lien sought to be enforced in this case, was an equitable right in the land which existed at the time the discharge in bankruptcy was granted, and that the lien was not discharged, or the right defeated, by the discharge in bankruptcy.

The next defence set up is, lapse of time in analogy of the statute of limitations; and that, I think, must fail, also; I do not see how it can apply. It is true the time when the lien arose was more than twenty years ago, but the judgment was not twenty years old when the bill was filed here, and the statute of limitations could not even be applied to the judgment. I think I ought to have mentioned, on the other point, the case of *Ocean Bank v. Olcott*, 46 N. Y. 12, cited by defendant. I do not think it applies at all; the circumstances of that case were entirely different. It was not a case of vendor's lien, but of a statutory right given to a judgment creditor to come into court and impeach a certain class of conveyances, and the court held that juris-

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diction was based on the statute which requires an actual existing debt *in personam*.

But there is another case in New York which was not cited, which bears closely upon the question of the statute of limitations. You will find it cited in *Jones on Mort.* § 1209. It is an earlier case than the case in 46 N. Y. It is *Borst v. Corey*, 15 N. Y. 505. That is a case where the statute of limitations was set up against a vendor's lien, because the deed was more than six years old. If that case was in point, I would not follow it. But I do not think it is in point, because here the debt itself is not outlawed. I refer, on this part of the case, to *Lingan v. Henderson*, 1 Bland 272, and *Moreton v. Harrison*, 1 Bland 501. Then, I think the statute of limitations does not apply.

Then it is said there is a defect of parties, viz., the assignee in bankruptcy and personal representatives; but I can not see any defect of parties. I can not see who can be said to be interested in this property, who has not been made a party. The case shows, if it shows anything, that the deed impeached in favor of complainant, is good between Graves and his wife, and none of his heirs at law can touch it. They have no interest in it. Then the administrators, if any there be, have no interest in it, and there is no party in the world, except possibly the assignee, who has a particle of interest, because the deed, by the well-settled rules of law, was good between the parties.

And then there is no right of recovery over by the defendant against the personal estate in this case, if there was any personal estate to recover against. And it does not appear that the assignee in bankruptcy has made any claim against this property, nor that he had any interest in it, or could sustain any claim. And if he could, the defendant can not complain that he has not been brought in.

That point—want of parties—was not taken in the answer, and the court would be very reluctant, at this stage of the case, to listen to such an objection. Therefore, I am prepared to advise a decree in favor of the complainant.

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Some things I have not fully considered, whether or not there ought to be (I have partly considered this) an inquiry as to what defendant has received from the sale and the mortgage of the lands. I am inclined to think there should be such an inquiry, unless counsel can show some reason to the contrary, as to what money she has received. As to the extent and exact form of that inquiry, I have not considered, nor have I considered whether or not there is anything in the case to warrant an inquiry as to whether or not all the judgment in New York was for unpaid purchase-money. My impression is, the case shows it was. I did not examine it carefully. If counsel can show it was not all for unpaid purchase-money—from the record, of course, they can not go outside of the record for that—that question may be left open, and I will hear both counsel, if they wish.

Mr. Leon Abbett, for appellant.

I. The complainant has no standing in court, as a creditor at large, to impeach the conveyance to the defendant, or to subject the lands in question to the payment of his debt. *Davis v. Green*, 11 C. E. Gr. 436; *Ocean National Bank v. Olcott*, 46 N. Y. 12, 18; *Pratt v. Curlis*, 6 N. B. R. 129; *Inking v. Wilcox*, 11 Paige 589; *Day v. Cooley*, 118 Mass. 524.

II. The complainant had no lien on the lands in question, either before or at the time of Roswell Graves's discharge in bankruptcy, and said discharge bars and extinguishes any claim or equity which the complainant, as vendor, may have had prior thereto, for any unpaid balance of purchase-money. *Ocean National Bank v. Olcott*, 46 N. Y. 12–16, 22; *Ruckman v. Cowele*, 1 N. Y. 505; *Depuis v. Swart*, 3 Wend. 135; *Baker v. Wheaton*, 5 Mass. 509; *Stewart v. Reckless*, 4 Zab. 427; *Borst v. Corey*, 15 N. Y. 505, 508; *Story's Eq. Jur.* § 1216; *Neate v. Duke of Marlborough*, 3 Myl. & Cr. 407, 415; *Gilman v. Brown*, 1 Mason, 191, *Story J.*; *Trotter v. Erwin*, 27 Miss. 772; *Mackreath v. Symons*, 1 White & Tud. Lead. Cas. in Eq. 491, 492; *Story's Eq. Jur.* § 1217; *Baum*

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v. *Grigsby*, 21 Cal. 172; *Williams v. Young*, Id. 227; *Palmer v. Merrill*, 57 Me. 30.

III. The judgment obtained in the New York supreme court, merged and extinguished the original debt for any balance of purchase-money, and the vendor's lien or equity, being based solely on the original debt, was merged and extinguished at the same time. *Barnes v. Gibbs*, 2 Vr. 318; *Borst v. Corey*, 15 N. Y. 505.

IV. The complainant's claim is barred by lapse of time, more than twenty-three years having elapsed since it accrued. *Borst v. Corey*, 15 N. Y. 505, 508; *Trotter v. Darwin*, 27 Miss. 772, 779; *Barnes v. Taylor*, 12 C. E. Gr. 76; *Ang. on Lim.* § 469; *McClane v. Shepherd*, 6 C. E. Gr. 76; *Story's Eq. Jur.* § 1217.

Messrs. Collins & Corbin, for respondents.

I. The conveyance was fraudulent and void.

(a) Defendant had actual notice. *Tillinghast v. Champlin*, 4 R. I. 173; *Hopkins v. Doty*, 25 Wis. 573.

(b) Defendant had constructive notice. *McLaren v. Hall*, 26 Iowa 297; *Case of Distilled Spirits*, 11 Wallace 356; *Story's Eq.* §§ 399, 408; *Williamson v. Brown*, 15 N. Y. 354, 359; *Sheldon v. Cox*, 2 Eden 228; *Dryden v. Frost*, 3 Myl. & Cr. 670; *Weilder v. Farmers Bank*, 11 Serg. & R. 134; *Bank of U. S. v. Davis*, 2 Hill 451, 461; *Kennedy v. Green*, 3 Myl. & K. 699, 719; *Dart on Vendors* p. 412; 3 *Sugden on Vendors* p. 319; *Bourset v. Savage*, L. R. (2 Eq.) 134; *Rolland v. Hart*, L. R. (6 Ch. App.) 678, 682; *Bump on Fraudulent Conveyances*, 547, 548.

(c) Defendant is not a *bona fide* purchaser for value. 2 *White & Tudor's Lead. Cas. in Eq.* (ed. 1876) 33, 83, 84, 99, 102, 106, 107, 134; *Lloyd v. Lynch*, 4 Casey 419; *Haughwout v. Murphy*, 7 C. E. Gr. 531; *Patten v. Moore*, 32 N. H. 382; *Everts v. Agnes*, 4 Wis. 356; *Boyd v. Dunlap*, 1 Johns. Ch.

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478 ; *Demarest v. Terhune*, 3 C. E. Gr. 532 ; *Mingus v. Condit*, 8 C. E. Gr. 313 ; *Pancoast v. Dural*, 11 C. E. Gr. 445 ; *Cary v. White*, 52 N. Y. 138 ; 1 *Hilliard on Mortgages* p. 680 ; *Annin v. Annin*, 9 C. E. Gr. 184.

II. Complainant's claim as a general creditor. *Bean v. Smith*, 2 *Mason* 283 ; *Curtis v. Gibbs*, 1 *Pen.* 399 ; *Davis v. Dean*, 11 C. E. Gr. 436 ; *McCartney v. Bostwick*, 32 N. Y. 53 ; *Pendleton v. Perkins*, 49 *Mo.* 565 ; *Peay v. Morrison*, 10 *Gratt.* 149 ; *Siceeney v. Ferguson*, 2 *Blackf. (Ind.)* 129 ; *Greenway v. Thomas*, 14 *Ill.* 271 ; *Shurts v. Howell*, 3 *Stew.* 418, and cases cited ; *Hasten v. Castner*, 2 *Stew.* 536 ; *Palmer v. Morrill*, 57 *Me.* 26 ; *Ocean Bank v. Olcott*, 46 N. Y. 12 ; *Bump's Bankruptcy* p. 746, citing *Otis v. Gazlin*, 31 *Me.* 567, and *Maxim v. Morse*, 8 *Mass.* 127 ; *Tichenor v. Allen*, 13 *Gratt.* 15 ; *Clark v. Clark*, 17 *How.* 315 ; *Crossley v. Ellsworth*, *L. R. (12 Eq.)* 158 ; *Rugely v. Robinson*, 19 *Ala.* 404 ; *Phelps v. Curtis*, 16 N. B. R. 85, 80 *Ill.* 109.

The assignment in bankruptcy. *Bump's Bankruptcy* (8th ed.) p. 590, notes to § 5046. *Smith v. Dispatch Co.*, 6 *Vr.* 60 ; *Tichenor v. Allen*, 13 *Gratt.* 15 ; *Rugely v. Robinson*, 19 *Ala.* 404 ; *Allen v. Montgomery*, 48 *Miss.* 101 ; *Dewey v. Moyer*, 16 N. Y. Sup. Ct. 473 (1877) ; *Phelps v. Curtis*, 80 *Ill.* 109, 16 N. B. R. 85 ; *Bank v. Leggett*, 51 N. Y. 552 ; *Wood v. Stover*, 1 *Stew.* 248 ; *Kinna v. Smith*, 2 *Gr.* 14 ; *Parker v. Sterens*, *Id.* 56 ; *Kelsey v. Western*, 2 N. Y. 500 ; *Seaman v. Kimball*, 4 *Barb. Ch.* 344 ; *Earle v. Camp*, 16 *Wend.* 571 ; *Duncan v. Spear*, 11 *Wend.* 57 ; *Cogdel v. Exum*, 69 N. C. 464 ; *Colie v. Jamison*, 4 *Hun* 284.

III. Vendor's lien. *Lewis v. Hawkins*, 23 *Wall.* 119 ; 1 *Lead. Cas. in Eq. (ed. of '76)* p. 483 ; *Gerson v. Green*, 1 *Johns. Ch.* 308 ; *Pylant v. Reeves*, 53 *Ala.* 132 ; *Russell v. Watts*, 41 *Miss.* 602 ; *Perkins v. Gibson*, 51 *Miss.* 699 ; *Armstrong v. Ross*, 5 C. E. Gr. 209 ; *Garland v. Rives*, 4 *Rand.* 282 ; *Smith v. Smith*, 22 *Iowa* 516 ; *Potter v. Phillips*, 44 *Iowa* 353 ; *Fox v. Moyer*, 54 N. Y. 125.

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IV. Limitation. 1 *Phil. Evidence* p. 676, note 193; 3 *Id.* 408.

V. Accounting. A fraudulent grantee must account for the proceeds of the property, to the creditor in fraud of whom the conveyance was made. *Dupley v. Kleinsmith*, 11 *Wall.* 610; *Post v. Stiger*, 2 *Stew.* 554; *Clement v. Moon*, 6 *Wall.* 229; *Ames v. Blunt*, 5 *Paige* 20; *Keep v. Sanderson*, 12 *Wis.* 391; *Steere v. Hoagland*, 50 *Ill.* 377; *Swinford v. Rogers*, 23 *Cal.* 234.

The opinion of the court was delivered by

SCUDDER, J.

The complainant's bill was filed to enforce a vendor's lien for part of the purchase-money of lands at Bergen Neck, in the county of Bergen (now in the city of Bayonne, in the county of Hudson) and state of New Jersey. By two several deeds, dated January 10th, 1853, and January 13th, 1853, respectively, the complainant conveyed these lands to Roswell Graves, the husband of the defendant. Judgment for a balance of the purchase-money was obtained by Eburn H. Coutant, the complainant, against Roswell Graves, in the supreme court of the state of New York. The suit was commenced by Graves against Coutant, July 7th, 1854; a counter-claim for the purchase-money was set up, and, after a long litigation, an appeal taken from the judgment of the supreme court was dismissed October 27th, 1875, and the judgment of that court, dated May 24th, 1860, was affirmed for \$6.433.66, with interest from May 24th, 1860, and for \$223.59, costs of increase, with interest from July 6th, 1864. While this suit was pending, to wit, on March 1st, 1860, Roswell Graves conveyed to Jacob R. Wortendyke, in consideration of \$1,000, as stated in the deed, all that part of the premises conveyed to him by this complainant, which had not been sold by him up to that date. On March 5th, 1860, only five days later, Wortendyke conveyed

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the same property to this defendant, Eliza A. Graves, wife of Roswell Graves, for the consideration therein expressed of \$1,000, by deed, without covenants for title. After the above deed to her, Mrs. Graves made conveyances and mortgages of portions of the premises conveyed to her.

On January 21st, 1871, Roswell Graves was discharged in voluntary bankruptcy, this claim not having been proved against him in said proceedings. He died July 29th, 1873. The bill of complaint in this case was filed in March, 1876. It is, in effect, to establish and enforce, by the decree of the court of chancery, the complainant's alleged lien for unpaid purchase-money, the amount of which had been settled by the judgment in the state of New York, upon so much of these lands as may still remain unsold in the name of said Eliza A. Graves, and an account from her for lands sold, charging that she is not a *bona fide* purchaser.

Upon this last point, I agree with the master in his opinion, that her uncertain statement of the consideration paid by her for this conveyance, and the small sum of \$1,000 in money, which she says she has paid, are insufficient evidence of a fair purchase for a good consideration of the large and valuable property described in the deed to her. As to this complainant, she stands in no more favorable position than her husband would do if he were living. She must be charged with notice of this claim when the conveyance was made to her, and there is also sufficient evidence that she had actual notice of an unsettled claim for purchase-money, which was opposed by her husband's allegation that he was deceived by a misrepresentation that there was no encumbrance on the property at Bergen Neck, when he bought of Coutant. This was the matter adjusted in the litigation in New York, and she knew of this controversy and suit resulting in the judgment which is produced here as evidence of the amount due and unpaid.

She further bases her title upon her husband's agency, in acting for her, and using her money in purchasing the property, thereby assuming all the knowledge and notice

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that he had. If she had paid a valuable consideration, with notice of the equitable rights of the complainant, she would hold the property subject to such equitable interests; and, if she did not pay such consideration, *a fortiori*, she will be charged with the same trust, in respect to the property, as her husband, from whom, or through whose agency, she has purchased. *Le Neve v. Le Neve*, Amb. 436; 2 Lead. Cas. in Eq. 231; 1 Perry on Trusts § 217 and note (4).

It is not only necessary that a defendant setting up a defence of a *bona fide* purchaser should clearly and unequivocally state in the answer that the purchase was for value, without notice, but he must also set forth all the particulars of the purchase, and must distinctly prove them. There has been a failure in this particularity, both in the answer and in the proof, in this case. We must therefore consider it upon its merits between the original parties.

And first, it is said that the complainant occupies the position of a creditor at large, having no judgment in this state, or execution, which binds these lands in controversy, citing *Bigelow Blue Stone Co. v. Magee*, 12 C. Gr. 392; *Davis v. Dean*, 11 C. E. Gr. 436, and other cases. But this rule is not applicable, for here the lien is an equitable one; the remedy at law is inadequate, and practically exhausted. The case is, therefore, exceptional. See *Haston v. Castner*, 2 Stew. 536; *Shurts v. Howell*, 3 Stew. 418, and the same cases on appeal.

The claim of a vendor's lien for purchase-money is one of peculiar equitable cognizance, and is only maintainable in a court of equity. There is a constructive trust when lands are conveyed and no security is taken for the purchase-money, that the purchaser shall be a trustee of the land for the vendor, until the purchase-money is paid. An equitable lien is given on the land for this unpaid purchase-money, not only against the vendee, but against all subsequent purchasers who take *mala fide*, or with notice that the purchase-money remains unpaid. This is the established law of our state, where our court of equity has followed the

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leading case of *Mackreth v. Symmons*, 15 Ves. 329; S. C., 1 Lead. Cas. in Eq. 336 &c.; *Van Doren v. Todd*, 2 Gr. Ch. 397; *Brinkerhoff v. Van Sciven*, 2 Gr. Ch. 251; *Herbert v. Scofield*, 1 Stock. 492; *Dudley v. Dickson*, 1 McCart. 252; *Armstrong v. Ross*, 5 C. E. Gr. 109; *Corlies v. Howland*, 11 C. E. Gr. 311.

In some of the states this doctrine is rejected. In *Gilman v. Brown*, 1 Mason 191, Justice Story says that "Massachusetts has no court of chancery to recognize and enforce such a lien, and the peculiar principles and doctrines of courts of equity have never been adopted into its jurisprudence." This has been recently affirmed in that state in *Ahrend v. Odiorne*, 118 Mass. 261 (1875), where the court says that no such lien exists in that commonwealth, in any case, without agreement in writing. The opinion of Chief-Justice Gray, in that case, is an able defence of the law as there maintained. An elaborate note, collecting the cases and different holdings of the courts in all the states, will be found in 1 *Perry on Trusts* § 232, note 2.

Chancellor Green states the law, as held in our state, in *Dudley v. Dickson*, thus: "The well-settled rule of equity, that the vendor of real estate has a lien upon the land sold for the purchase-money, is recognized and adopted in this state. The taking of the note or bond of the purchaser for the unpaid purchase-money will not impair the lien."

It is settled, also, that the recovery of a judgment on such note or bond, or for the purchase-money where no note or bond is taken, will not affect the vendor's lien as a merger, for until there is payment, or some legal equivalent or bar to the recovery, the lien and the equitable right to have the purchase-money, remain.

If this lien exists by the operation of a constructive trust, then I think it must also be concurrent with it, and attach at the time the vendor obtains his right in the property, and it will continue so long as the trust remains, or, as some of the cases say, so long as an action can be maintained for its collection. 1 *Perry on Trusts* § 234.

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It is held in *Borst v. Corey*, 15 N. Y. 505, and in *Trotter v. Erwin*, 27 Miss. 772, that the vendor's lien will be barred by the statute of limitations, while, in other cases (*Moreton v. Harrison*, 1 Bland 491; *Lingan v. Henderson*, 1 Bland 236; *Relfe v. Relfe*, 34 Ala. 500) it is said, that it is of the nature of a direct or express trust, and cannot be barred by the statute. A strong argument may be made for the former holding, from the importance of clearing title to lands.

But it is not material to determine this disputed question here, for in this case there is no bar by the statute of limitations of the debt for unpaid purchase-money. Although the sale of land was made in 1853, the action for the recovery and adjustment of this money was begun in 1854 and continued until 1875, when it was finally determined. The statute would not run against the debt during the pendency of the suit. In this state, the bill of complaint was filed in 1876. I think, therefore, that this vendor's lien is in a shape to be enforced, notwithstanding the time which has elapsed since it first attached.

The further defence that the claim was barred by the discharge of Roswell Graves in bankruptcy, in 1871, is also untenable. Upon this point *Lewis v. Hawkins*, 23 Wall. 119, is conclusive. It holds, in substance, that where, by the law of any state, a vendor's lien for purchase-money is recognized, a discharge of the vendee, or his purchaser with notice, will not discharge the lien of the vendor. It also covers the other point of the case, that the statute of limitations will not affect such lien, because the vendee, or the purchaser from him with notice, stands in the relation of a trustee or mortgagor for the unpaid purchase-money.

Other cases may be cited to maintain the construction that the vendor's lien for unpaid purchase-money is not discharged by bankruptcy, and will prevail against the assignee of the bankrupt. *Tichenor v. Allen*, 13 Gratt. 15; *Rugely v. Robinson*, 19 Ala. 404; *Phelps v. Curts*, 80 Ill. 109; *In re Perdue*, 2 N. B. R. 67.

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There is no charge, however, in this case, that the assignee in bankruptcy ever claimed or asserted any right in this real estate in controversy, under the assignment.

The proviso in the second section of the bankrupt law, passed by the congress of the United States August 19th, 1842, "that nothing in this act contained shall be construed to annul, destroy or impair any liens, mortgages or other securities on property, real or personal, which may be valid by the laws of the states respectively, and which are not inconsistent with the second and fifth sections of that act," has been interpreted in our supreme court (*Vreeland v. Bruen*, 1 Zab. 214) to mean that, in letter and spirit, it embraced any liens valid by the laws of the state, whether legal or equitable, arising under contract or otherwise, or, whether perfected by judgment, or only inchoate, but valid until perfected by judgment. That case only settled the validity of a creditor's attachment under the law of this state, but the statement of the proper construction of the proviso would cover the case of a vendor's lien in equity, which is so clearly and strongly established by the law of our state. And such is the policy of the subsequent bankrupt laws, and the rule in construing them. A lien which is saved under these laws, is such an one as is recognized by the law of the state where it is claimed to be binding and effective.

It only confuses the question to refer to decisions of courts in other states where a vendor's lien in equity is not regarded as it is under the law of our state; and it is too late to discuss the policy of the law which has been so long settled by the rulings of our highest courts.

It does not appear by the pleadings or the evidence, that any other parties are interested in this controversy, except those who are now before the court as complainant and defendant; or, that there is any defect of parties; the case has, therefore, been considered and decided with reference to them; and the defendant, both as to the lands conveyed to her which remain unsold, and the proceeds of the sales of

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such portions as have been conveyed by her, should be charged with the vendor's lien for purchase-money unpaid by her husband, and claimed in this action.

The decree is affirmed.

Decree unanimously affirmed.

ADRIAN VAN BLARCOM and EDWARD R. WEISS, executors &c.,
appellants,

v.

JOSEPH THOMAS DAGER and others, respondents.

Where the income of all of a testator's property was given to his wife, for life, with a gift over of the principal at her death.—*Held*,

(1) That the premium received by her on certain gold coin belonging to testator's estate, was part of the corpus, and not income to which she, as life tenant, was entitled.

(2) That the interest receivable by her must be computed from the date of testator's death.

On May 1st, 1862, George W. Hughes, of Paterson, in the state of New Jersey, then temporarily living in Russia, departed this life, and having before his death, and on the 31st day of December, 1858, duly made and executed his

NOTE.—If a legacy be given in a foreign country, and in a foreign coin, but payable in England, the rule is to compute the amount *there*, as converted into sterling, without any allowance for exchange or the expense of remittance. *Cockerell v. Barber*, 16 Ves. 461; *Holmes v. Holmes*, 1 Russ. & Myl. 660; *Saunders v. Drake*, 2 Atk. 466; *Otis v. Coffin*, 7 Gray 511; *Bowditch v. Soltyk*, 99 Mass. 136; *Stewart v. Chambers*, 2 Sandf. Ch. 282. See *Campbell v. Graham*, 1 Russ. & Myl. 453, 2 Cl. & Fin. 429; *Scott v. Bevan*, 2 Barn. & Ad. 78; *Lansdowne v. Lansdowne*, 2 Bligh 60; 1 Rep. on Leg. *856; *Blanchard v. Equitable Co.*, 12 Allen 386; *Scotfield v. Day*, 20 Johns. 102; *Wilson v. Morgan*, 4 Roberts. 58; *Robinson v. Hall*, 28 How. Pr. 342; *Grant v. Healey*, 3 Sumn. 523; *Baker's Appeal*, 59 Pa. St. 313; *Carter v. Swift*, 1 Low. 398; *Doll v. Earle*, 65 Barb. 298; *Tufts v. Plymouth Co.*, 14 Allen 407; *McClarín v. Nesbitt*, 2 Nott. & M. 519; *Cary v. Courtenay*, 103 Mass. 316; *Bohn v. Broadhagen*, 2 Cin. (Ohio) 2.

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last will and testament in due form of law, and published the same in the presence of three subscribing witnesses thereto, as follows :

"I, George Washington Hughes, of New Jersey, in the United States of America, now temporarily residing in Russia, make, publish and declare this to be my last will and testament, namely :

"I give, devise and bequeath to my wife, Catharine Hughes, for and during her natural life, all my property, real and personal, to have, receive and use the income thereof, but without power to alienate or encumber the principal thereof, and with the condition that she shall pay out of said income the sum of one thousand dollars to my son George Washington Hughes, when he attains the age of twenty-one years, and shall also pay the like sum to each other child of mine, on its arrival at the age of majority.

"I give, devise and bequeath to my son George Washington Hughes, upon and after the death of said Catharine, my wife, all my property, real and personal, to be equally shared, however, by him with any other child or children of mine then living.

"If neither my said son nor any other descendants of mine are living at the time of the death of my wife aforesaid, then, upon her death, I devise, bequeath and direct that all my property, real and personal, shall be equally distributed as follows, namely : one-fifth part to the children of my brother John Hughes ; one-fifth part to the children of my brother Jarrett Hughes ; one-fifth part to the children of my brother Scott Hughes ; one-fifth part to the children of my brother William Hughes, and one-fifth part to the child of my deceased sister Elizabeth Davison.

In *Cole v. Cole*, 1 Dev. 460, a bequest of a slave and her increase, passed only the increase born after testator's death. See *Holmes v. Mitchell*, 4 Md. Ch. 263 ; *Perry on Trusts* § 546.

In *Brewster v. McCall*, 15 Conn. 274, a testator gave to his wife one-third of the use of a certain farm, during her natural life, "together with the stock of said farm."—*Held*, that she took the stock absolutely. See *Loveren v. Lamprey*, 22 N. H. 434 ; *Moultrie v. Hunt*, 10 Am. Law Reg. 165 ; *Dole v. Johnson*, 3 Allen 364.

An unconditional bequest of the dividends of certain stock, is a bequest of the stock itself. *Collier v. Collier*, 3 Ohio St. 369.

In *Hartley v. Allen*, 4 Jur. (N. S.) 500, £17,000, profit derived by a corporation from the sale of new shares of stock issued by the company, was ordered to be divided ratably among the stockholders,—*Held*, that a life tenant of certain of the old shares was not entitled to any part thereof.

In *Brander v. Brander*, 4 Ves. 800, a life tenant was held to be not entitled to a dividend of the surplus capital or reserved profit of a

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"And I hereby revoke any former will or wills made by me, and declare this to be my last will and testament.

"And I nominate and desire to have appointed as executrix of this my last will and testament, my wife Catharine Hughes, and desire that she may not be required to give any bonds regarding its execution."

Testator's only child, George Washington Hughes, died before him, leaving no lawful issue. Joseph Davison, the son of testator's sister, Elizabeth Davison, died after testator, but before testator's wife, Catharine Hughes. Testator's brothers survive. On September 15th, 1862, Catharine Hughes proved the will before the surrogate of Passaic county. Part of the estate consisted of roubles and copecks deposited in St. Petersburg, and sterling in London, then of the gold value of \$37,499.51, which the executrix sold, on October 21st, 1862, @ 139, producing in currency, \$52,573.89.

On October 20th, 1868, Catharine married Edward M. Weiss.

A bill was filed for a construction of the will, and an injunction issued to prevent Catharine and her husband from transferring or converting to their own use, any part of the estate; and, also, a *ne exeat* to prevent their leaving the state until after they had transferred the funds of the estate, by an assignment, to a receiver appointed by the court. The assignment was executed.

bank, ordered by the corporation to be divided ratably among the stockholders.

In *Hooper v. Rossiter*, 13 Price 774, under a bequest of the interest, dividends, proceeds and profits of a sum of stock, to S. F. for life, and of the stock itself, at her death, to E. A. F., a bonus of twenty-five per cent. derived from an increase of the stock of the company, was held to go to E. A. F., the remainderman.

In *Maclaren v. Stainton*, 3 DeG. F. & J. 202, a large deficiency due from a testator to a corporation was compromised by his executors, and, after its payment, the company declared a bonus thereof, on its shares,—*Held*, that the whole of such bonus on the shares that constituted the residuary estate, belonged to the tenants for life, as income. Also, *Nicholson v. Nicholson*, 9 W. Rep. 676.

In *Simpson v. Moore*, 30 Barb. 637, after a trust to executors to invest and pay the income of one-sixth of testator's estate to his widow for life, and then over, an investment was made in bank stock. The bank re-organized and declared a dividend of eighteen per cent., leav-

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On May 11th, 1877, Catharine died, leaving a will, and her executors were thereupon substituted in this suit.

The following is the opinion of the vice-chancellor :

The following conclusions have been reached. No formal opinion will be filed.

First—The legacy to Joseph Davison vested in him on the death of the testator, and his representatives are entitled to it. *Post v. Herbert*, 12 C. E. Gr. 540 ; S. C., 11 C. E. Gr. 278 ; *Van Dyke v. Vanderpool*, 1 McCart. 198 ; *Howell v. Green*, 2 Vr. 570 ; *Beatty v. Montgomery*, 6 C. E. Gr. 324.

Second—The income bequeathed to the testator's widow for life, did not begin to accrue until one year after the probate of his will. The gift is a legacy payable at different periods, and as no time is fixed by the will for the payment of any part, no part of it became payable until the expiration of one year after probate. *Rev. 581 § 1* ; *Church at Acquackanonk v. Ackerman*, Sax. 40 ; *Brinkerhoff v. Marselis*, 4 Zab. 680 ; *Halsted v. Meeker*, 3 C. E. Gr. 136 ; *Hennion v. Jacobus*, 12 C. E. Gr. 28. There is nothing in the nature of the gift to show that the testator intended any part of it should be payable earlier than the time designated by law ; there is certainly no more evidence of such an intention, than there

ing it optional with the stockholders to take stock in the new bank with such dividend, or to take it in cash. The trustee took the stock.—*Held*, that so much of the eighteen per cent. as represented the old capital, belonged to the remainder.

In *Woodruff's Case*, 1 Tuck. 58, after a gift of a life estate in a residuum to a widow (in lieu of dower), with remainder over, a corporation in which testator held stock, two days after his death was authorized to double its capital. The new stock was apportioned among the old stockholders, and an extra dividend of \$18 per share out of the surplus profits declared, to be credited on the subscriptions to the new stock.—*Held*, that the new stock subscribed for by the executor, to the extent of \$18 per share, belonged to the widow.

In *Wiltbank's Appeal*, 64 Pa. St. 256, after a trust, composed partly of stocks, to pay \$1,400 annually from the income of testator's estate to his daughter, and the remainder to his son, had been given, one corporation, whose stock was valued at \$100 at par. increased its capital,

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would have been had the testator given the interest or income of a specified portion of his estate. *Halsted v. Meeker's ex'r* and *Hennion's ex'r v. Jacobus*, are direct authorities that, had the gift been in that form, no interest or income would have accrued until the expiration of a year after probate.

Third—The premium received on the sale of the gold, as well as all other accretions, additions and profits, accruing during the year immediately subsequent to the probate of the will, constituted part of the principal fund, and did not pass to the widow as income. *Van Doren v. Olden*, 4 C. E. Gr. 176.

Fourth—The representatives of the widow must account for the premium actually received on the sale of the gold, and not for what might have been received had it been sold at a later day.

A decree, drawn in conformity to these conclusions, will be advised.

From this decree the appeal was brought.

Mr. Thomas M. Moore, for appellants.

I. (1) The decree prevents the widow from receiving any of the first year's income—not even the interest accruing during that year on any investments of the principal of the estate can be allowed her. The widow is entitled to the

allotting to each stockholder forty per cent. in stock, upon the payment of \$75 per share. The trustee sold this privilege for about \$20 per share, carrying the proceeds to the capital fund of his trust. Another corporation increased its capital on nearly similar terms, and the trustee subscribed to the new stock, and afterwards sold the stock at a profit of \$400, which he also carried to the corpus.—*Held*, that both items were income. *CONTRA*, *Atkins v. Albres*, 12 Allen 359.

In *Emery v. Wason*, 107 Mass. 507, a testator, owning shares of stock in a corporation, subscribed for new shares and paid half the price thereof. He died before the remaining half was payable, and his executors paid it and took the new certificates. Under a bequest to his son for life of "the income of my stock," with remainder to the son's children.—*Held*, that the new shares passed as capital. See, also, *Billings v. Billings*, 110 Mass. 225; *Rand v. Hubbell*, 115 Mass. 461; *Lord v. Brooks*, 52 N. H. 72; *Winslow v. Haven*, Id. 76; *Perry on Trusts*, §§ 544–546.—R&P.

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income from the death of the testator. He gives to her the income of all his estate, real and personal. Unquestionably, she is entitled to the income of the real estate from the testator's death, and it is fair to presume that the testator intended the same rule to govern the income of both estates. He is required to pay the testator's son George, out of the income, one thousand dollars, upon his becoming twenty-one years of age. If he had reached that age during the first year after the testator's death, the widow could not have then paid him his legacy, except by using the first year's income.

(2) When a testator bequeaths the entire income of his estate to his widow for life, she is entitled to the income accruing from his death. 2 Redf. on Wills, ch. 4 §§ 6, 31, subd. 11 and 12; Perry on Trusts §§ 548, 551; 2 Spence's Eq. Jur. p. 567; Green v. Green, 3 Stec. 451.

(3) Where a specific sum of money is bequeathed, or the interest on a specific sum, without any time of payment being specified, a year's grace is granted by law to the executor within which to make the payment, in the one case, or the investment to produce the interest in the other. No more than this is decided by the New Jersey decisions cited in the vice-chancellor's opinion.

The executor may pay a legacy at any time within the first year, if so disposed, without risk. Angerstin v. Martin, Turn. & Russ. 232, cited in note 2; 2 Redf. on Wills p. 466 ch. 4 § 31 subd. 1.

The New York cases, while holding that legacies of specific sums do not draw interest until one year after the testator's death, hold, nevertheless, that where income is bequeathed, it accrues from the testator's death. Williamson v. Williamson, 6 Paige 298; Cogswell v. Cogswell, 2 Edw. Ch. 231.

II. At the testator's death gold was at a slight premium. The premium increased until the date of the sale by the executrix of the draft. The excess of premium was income,

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and should have been allowed to her. *Perry on Trusts* § 545, and note; *Van Doren v. Olden*, 4 C. E. Gr. 176; *Ashurst v. Field*, 11 C. E. Gr. 11.

Mr. A. B. Woodruff, for respondents.

I. The first ground of appeal is not well founded. The decree decided, properly, that the legatee for life was entitled only to the income from one year after testator's death. The persons in remainder (the complainants below) were entitled to have the fund brought here and invested under the direction of the court of chancery. And the court should have held the fund until final distribution to those entitled. *Holland v. Hughes*, 16 Ves. 111, 3 Mer. 685; *Preston v. Melville*, 15 Sim. 35.

The English rule is to take the *value* of the estate, at what it was worth, or would sell for, one year after the testator's death. *Caldecot v. Caldecot*, 1 You. & Coll. 312, 737; *Turner v. Newport*, 2 Phill. 14; *Sutherland v. Cook*, 1 Coll. 504, 505, 1 Hare 170.

The rule in New Jersey is the same. *Rev. p. 581 § 1*; *Hennion v. Jacobus*, 12 C. E. Gr. 28; *Halsted v. Meeker*, 3 C. E. Gr. 140; *Church at Acquackanonk v. Ackerman*, Sax. 43.

The appellants say that Mrs. Hughes (Weiss) was entitled to the income of the *real* estate from the death of the testator, and, therefore, is entitled to interest on her legacy from the same time.

First—The answer is, there was no real estate.

Second—There is nothing in the will to show any intention in the testator to take her legacy out of the general rule.

The cases cited by the appellants to establish the proposition that “where a testator bequeaths the *entire* income of his estate to his widow for life, she is entitled to the income accruing from his death”—fail to do so. And the books cited admit the *rule* to be as we contend. One answer

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to this is that the "entire" income was not bequeathed to her. Appellants cite 2 *Redf. on Wills* ch. 4 § 5 subd. 11, 12. There is no such section in that chapter. Section 6 is in chapter 1, and does not refer to the question. They cite *Perry on Trusts* § 548, 551. Sections 548 and 550 admit the rule to be as we contend. Section 551 refers to cases of real estate, and cases which turned on the *language* of the will, and *intention* of the testator. The cases cited in clause 7 of section 551, to wit, *Llewellyn's Trust*, 29 *Beav.* 171, and *Meyer v. Simonson*, 5 *DeG. & Sm.* 723, show that the rule allowing a certain per cent. interest from testator's death is upon "the value taken at the *expiration* of one year from the testator's death." This being the time which, by the rule we contend for, is fixed by the law for the ascertainment of the amount of the estate, and when all legacies are payable; and, inasmuch as there is nothing in the will to show testator intended that the executrix should pay income to any one, until the time fixed by law to ascertain the amount of the principal fund, that is, one year from testator's death, there is nothing in this case to take this legacy to Mrs. Hughes out of the general rule. The same remarks are a sufficient answer to 2 *Spence's Eq. Jur.* 567. They also rely on *Green v. Green*, 3 *Stew.* 451. Page 457 of this case says: "The rule which gives the executor one year, was made to secure him from embarrassment in the settlement of the estate." I submit that this is not the reason of the rule. The reason is, that a definite time should be fixed, at which the amount of the estate is to be ascertained, or fixed—in reference to which the income may be calculated. 2 *Redf. on Wills* ch. 4 § 31 subd. 1; *Perry on Trusts* ch. 19 § 575.

So far as *Green v. Green* decides that a tenant for life of *personalty* is entitled to interest from testator's death, *when no time is fixed by the will for the payment of the legacy*, the case of *Howard v. Francis*, 3 *Stew.* 448, is a perfect answer. The limitation by statute (*Rev. p.* 581 § 1) may have had for one of its objects the protection of the executor from litiga-

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tion for one year, but the whole section shows the legislature comprehended the pre-existing rule, and the proviso in the section shows they understood the difference between cases where a time was *fixed* in the will for the payment of legacies, and those where no time was fixed.

Counsel cites *Angerstin v. Martin*, *Turn. & Russ.* 232, cited in *Redfield on Wills* ch. 4 § 31 subd. 1 note 2, and some New York cases, for the purpose of making a distinction between interest on legacies and income. There is no such distinction. The chancellor, in *Howard v. Francis*, 3 *Stew.* 448, cites the case of *Williamson v. Williamson*, 6 *Paige* 298, and holds that the widow could have "interest only according to the common rule, notwithstanding the fact that the legatee was, at the testator's death, dowable of lands of which he died seized."

II. The second ground of appeal is not well founded. Catharine Weiss was not entitled to the premium she received on the sale of the gold she brought, as executrix, from Russia to this country. Such premium was not income—that is, annual earnings—it was a mere change in the form of the corpus of the fund. It was simply changing one kind of currency for another. It still remained the principal of the fund from which she was to receive income. In *Dimes v. Scott*, 4 *Russ.* 195, a part of the interest was added to the corpus. In *Taylor v. Clark*, 1 *Hare* 161, the rule is well stated by Vice-Chancellor Wigram. In *Wray v. Smith*, 14 *Sim.* 202, it is said that a sale is simply a conversion of the corpus from one form into another. *Mackie v. Mackie*, 5 *Hare* 70; *Sparling v. Parker*, 9 *Beav.* 524; *Gibson v. Bott*, 7 *Ves.* 89; *Fearns v. Young*, 9 *Ves.* 552; *Howe v. Lord Dartmouth*, 7 *Ves.* 137a; *Crawley v. Crawley*, 7 *Sim.* 427; *Mills v. Mills*, 7 *Sim.* 501; *Mousley v. Carr*, 4 *Beav.* 49, are to the same effect. *Phayre v. Perce*, 3 *Dow.* 128, a unanimous decision by the house of lords. *Hill on Trustees* (ed. of 1846) p. 386–389; *Valentine v. Strong*, 20 *Md.* 522. 3 *Story's Eq. Jur.* §§ 1273, 1273a, 1274, maintain the same doctrine.

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If she had sold the gold on March 15th. 1852, over six months previously, she would not have sold it for so much. Suppose the gold had been a ship, would that increase in value have been "use" or "income?" Would it not clearly have been an increase in *value* of the corpus? Can an increase in the value of a ship, a horse, or a quantity of gold, or a draft, in any sense be called the "income" of or from any of them? The authorities cited, *Perry on Trusts*, 4 C. E. Gr. 176; 11 C. E. Gr. 11, all refer to the earnings or interest of the *corpus*.

III. It was the duty of the executrix, Catharine Hughes (afterwards Weiss), to have filed a bill in the court of chancery, so soon as she arrived in New Jersey, and placed the fund under the control of that court, and invested and re-invested it under the direction of that court. Whether or not she was entitled to the income the first year after testator's death, her representatives now make a question. When the gold should have been sold, was a question; on what amount she was entitled to receive income was a question; also, as to how the money should be invested; and she ought to have brought them to the notice of the court, and had them decided. *Quick v. Fisher*, 4 Hal. Ch. 674, 778. If she made a change in the fund without such direction, the gains belong to the fund, the losses are chargeable to her. *Quick v. Fisher*, 1 Stock. 802, 805.

The cases relied upon from other states, by the appellants, such as *Williamson v. Williamson*, 6 Paige 306, that the executor shall *estimate* the value at the testator's death, and pay interest or income on that amount, are contrary to the policy of our law, and opposed to the decisions in this state. Such a doctrine would furnish no *rule*, for there would be no *certainty* as to what debts come against the estate. That interest, or income, begins to run from one year after the testator's death, has been the rule of this state from the earliest period to the present time. *Barnes v. Danforth*, 2 Stew. 12; *Howard v. Francis*, 3 Stew. 444, 448.

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The opinion of the court was delivered by

Dodd, J.

By the will of George W. Hughes, deceased, the income of all his property, personal and real, was given to his wife during the term of her natural life, with a bequest over of the principal at her death. The testator died while in Russia, on the 15th of October, 1862, and his will was subsequently proved by his widow and executrix, before the surrogate of Passaic, in this state. A portion of his property was balances in the hands of bankers in Europe, which balances were represented by a draft on Baring Brothers & Co., in London. This draft, for the sum of over eight thousand pounds sterling, was sold by the executrix, in New York, on the 21st of October, 1862. Its gold value was then and there the sum of \$41,227, for which, as there was then a premium on each gold dollar of twenty-seven and one-half per cent., the executrix received, in legal tender money, the sum of \$52,573.89.

In this suit now pending for the settlement of the estate, two questions were decided by the vice-chancellor, which are again raised by this appeal: First—Is the premium which was received by the executrix on the gold value of the draft, to be taken as part of the income of the estate, or is it to be taken as a part of the principal fund? Second—Is the income of the estate which was given to the wife, to be reckoned from the death of the testator, or from the expiration of one year thereafter?

It was held by the vice-chancellor, that the premium on the gold was not income, but a part of the principal. In this ruling I entirely concur. The appellants, in resisting it, relied upon the cases of *Van Doren v. Olden*, 4 C. E. Gr. 176, and *Ashhurst v. Field*, 11 C. E. Gr. 11. These cases do not support the appellant's claim. Trust funds, of which the income, interest or profits were given by a testator to one person for life, and the principal over on the life tenant's death, were there invested in the stock of an incorporated

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company. Extra dividends, in the form of new stock, had been made by the company, out of the earnings of their business; and the question was, whether the stock dividends were to be regarded as income or capital. The answer to the question was held to turn upon the point whether the earnings, out of which the dividends had been declared, had been carried to account of accumulated surplus laid up by the company before or after the investment was made. If before the investment, the dividends were adjudged to be capital and to belong to the remaindermen. If after the investment, they were income, and belonged to the tenant for life. The important circumstances distinguishing those cases from the present, were the existence of earnings or profits from the business; and, also, the declaring of the dividends on the distribution of such profits by the board of directors. A mere increase or rise in the market value of the investment would have been essentially different, and not to be regarded as income belonging to the tenant for life. The difference between the par value of the gold and its value in legal tender money, is not earnings, but, like the increase in value of the testator's jewelry or pictures, sold at an advance on their cost, is a part of the property from which income is to arise. If, in the draft, was included interest which had accrued on the testator's money after his death, such interest should be distinguished in the accounting from the principal on which it arose.

Second—At what time did the income to the widow begin to accrue? It was decreed by the vice-chancellor, to begin at the expiration of one year from the testator's death. To the correctness of the decree in this particular, I am unable to assent. It is grounded on the general rule, that legacies bear interest from the time they are payable, and upon the statutory provision, that the executor or administrator shall have a year after probate in which to pay legacies, where no time for their payment is fixed by the will. This general rule has been expressed and applied in cases adjudged in this state. *Church at Acquackanonk v.*

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Ackerman's ex'r, Sax. 40 ; Brinkerhoff v. Marselis's ex'r, 4 Zab. 680 ; Halsted v. Meeker's ex'rs, 3 C. E. Gr. 136 ; Hennion's ex'r v. Jacobus, 12 C. E. Gr. 28 ; Howard v. Francis, 3 Stew. 444.

In all these cases, the legacies were specific sums, or the interest of such sums, and differ from bequests of the residuary personal estate made to a legatee for life. This distinction is explained and enforced by the chancellor in the recent case of *Green v. Green*, 3 Stew. 452, in which the opinion was delivered after the decision of the present case. The rule that, where the residuary personal estate is given to a legatee for life, the interest thereon accruing from the testator's death, shall, in the absence of any direction to accumulate, go to the tenant for life, is declared, by the chancellor, to be established. It is placed, not on the presumption that the life interest was given for support, but on the equity which seeks, as between the life tenant and the remainderman, to give to each his due. To give the interest for the first year to the remainderman by treating it as part of the principal, is correctly said to be injustice to the tenant for life.

In addition to the authorities cited in the chancellor's opinion, reference may be made to *Perry on Trusts* § 551, and the accompanying notes. I am of the opinion that the appellants should be allowed the income from the testator's death.

The decree should be reversed.

Decree unanimously reversed.

Mr. John T. Bird, for respondent.

PER CURIAM.

This decree unanimously affirmed, for reasons given
the chancellor in the case below, *3 Stew. 418.*

GEORGE B. BEATTY

v.

TRUSTEES OF THE CORY UNIVERSALIST CHURCH.

Mr. Thomas Kays and Mr. H. C. Pitney, for appellant

Mr. A. Q. Keasbey, for respondent.

PER CURIAM.

This decree unanimously affirmed, for reasons given
the chancellor in the court below, *1 Stew. 570.*

LUCRETIA A. F. BLACKWELL and others, appellants,

v.

Kirohner v. Miller.Whitenack v. Embury.

PER CURIAM.

This decree unanimously affirmed, for reasons given by the ordinary in the case below, 2 *Stew.* 576.

THERESA KIRCHNER

v.

ELIAS N. MILLER.

Mr. Benj. C. Potts, for appellant.

Mr. A. Q. Keasbey, for respondent.

PER CURIAM.

This decree unanimously affirmed, for reasons given by the chancellor in the case below, 3 *Stew.* 71.

JOHN H. WHITENACK

v.

ABRAHAM B. EMBURY.

Messrs. Linn & Babbitt, for appellant.

Mr. James W. Field, for respondent.

PER CURIAM.

This decree unanimously affirmed, for reasons given by the chancellor in the case below, 3 *Stew.* 517.

• Black v. Black.

CLAYTON A. BLACK

v.

CARRIE E. BLACK.

Mr. Garrit S. Cannon and Mr. James Wilson, for appellant.

Mr. S. D. Dillaye, for respondent.

PER CURIAM.

No written opinion was delivered. The decree of the vice-chancellor, *3 Stew. 215*, was reversed, excepting as to the amount due on the \$1,000 note.

For reversal—BEASLEY, C. J., DEPUE, DIXON, DODD, GREEN, LILLY, WOODHULL—7.

For affirmance—REED, VAN SYCKEL—2.

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A.

Abatement.

See BANKRUPTCY.

Accident and Mistake.

1. Relief prayed by a bill to rectify a deed, whereby, through the mutual mistake of the parties, a lot of land was conveyed instead of an adjoining one, can only be granted by transferring to such adjoining lot the encumbrances put on the former by the parties. *Weston v. Wilson*, 51
2. A deed of gift will always be set aside in equity, even in a case free from actual fraud, whenever it is clearly shown that the deed does not, in a material respect, conform to the intention of the grantor, or that he executed it under a total misapprehension as to its effect. *Mulock v. Mulock*, 594

See MORTGAGE, 26 ; REFORMING INSTRUMENTS, 4.

Account.

1. On a bill for an accounting, not alleging the existence of a partnership, but that the complainant is, by a verbal agreement with the defendant, entitled to one-half of the profits of a contract to build a tunnel, if the complainant fails to prove such verbal agreement, he cannot obtain relief in equity, on the ground that the evidence shows that he was to be paid out of the profits whatever his services were worth. *McAndrew v. Walsh*, 331
2. *Query*, Whether, if an agreement had been shown entitling the complainant to a share of the profits, not as a partner, but by way of compensation for services as an employe, the bill would be good for an accounting in the first instance, without bringing an action at law to recover the stipulated moneys. *Id.*, 331

See EVIDENCE, 8 ; EXECUTORS, 2 ; INTEREST ; LIMITATIONS ; DEBTOR, 3 ; DEVISE, 1 ; BANKRUPTCY ; PLEADING, 1 ; PRACTICE, 1.

Agent.

1. A person was employed to find a purchaser for a piece of property, the price to be fixed by the vendor. Having

Agent—Continued.

found a purchaser, with whom the vendor agreed as to the price,—*Held*, that the conduct of the agent having been fair, no further duty was imposed upon him in the matter, by reason of such special, qualified agency.

Hughes v. Young,

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See CORPORATION, 1; USURY, 2; VENDOR, 1.

Amendments.

1. An omission of the names of the parties from an unsworn answer, made by mistake of the solicitor,—*Held*, amendable, under the circumstances, after replication and testimony in behalf of the parties for whom it was put in as a mere pleading. *McMichael v. Brennan*,

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**Appeals.**

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Arbitration.

1. The power "to settle" on an assignment of a complainant's interest in a contract,—*Held*, not to authorize the assignee to include it in a general arbitration of all the matters in difference between him and the other party to the contract,—*Held*, also, that an award thereon obtained against the protest of the complainant, and by the assignee's deception, constitutes no bar to a specific performance of such contract. *Lawrence v. Emson*,

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Arrest.

See EVIDENCE, 4, 5.

Assignment for Benefit of Creditors.

1. An assignee under a voluntary assignment made by a debtor for the benefit of his creditors, cannot maintain an action to impeach transfers made by his assignor in fraud of creditors. *Pillsbury v. Kington*,
2. But where the transfer is a fraud upon the assignor, so that he might attack it, his assignee may avoid it. *Id.*,
3. An assignee, under an assignment for the benefit of creditors, must, within the time limited by statute, except to any duly presented claim which he deems doubtful. The creditor's delay in producing proof of the justness of such claim, does not estop such creditor or his assignee in bankruptcy, from demanding its allowance, nor excuse the assignee's neglect. *Miller v. Mulford*,

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Assignment for Benefit of Creditors—Continued.

4. *Held*, that such assignee might buy an interest of the purchaser of the debtor's real estate at a foreclosure sale under a mortgage thereon; but must account for the value of certain machines which, at the foreclosure sale, were sold as fixtures, although they were afterwards decided by the court to be personalty. *Id.*, 661
5. The assignee may, for the benefit of the estate, complete unfinished contracts of the debtor, provided he exercises a reasonable discretion. *Id.*, 661

See PARTNERSHIP.

B.**Bankruptcy.**

1. After a final decree on a default, and an order to account had been entered on a bill to redeem certain securities, the defendant was adjudged a bankrupt, and an assignee appointed.—*Held*, that the suit was not thereby abated; that it was not the duty of the complainants to make such assignee a party, but that, if the assignee desired to appear in the suit, it was his duty to apply for leave to be substituted for the defendant.—*Held*, also, accordingly, that he was bound by the proceedings. *Esterbrook Steel Pen Manf. Co. v. Ahern*, 3

See ASSIGNMENT, 3; VENDOR, 10.

Bastards.

See LEGACY, 4.

Bills and Notes.

See MORTGAGE, 14.

Bill of Peace.

1. The appropriate relief against successive suits by the same plaintiff for damages arising from an injury which is continuous, is by application for the consolidation of actions, or for a stay of proceedings, and not by bill in chancery, unless the right in controversy has once been determined adversely to the plaintiff. *Lehigh Val. R. R. v. McFarlan*, 730
2. A bill of peace, enjoining a litigation at law, is allowable only when the complainant has already satisfactorily established his right at law, or where he claims a general and exclusive right, and the persons who controvert it are so numerous that the endeavor to establish the right by actions at law would lead to vexatious and

Bill of Peace—Continued.

oppressive litigation, and renders an issue under the direction of the court indispensable to embrace all the parties concerned, and to avoid multiplicity of suits. *Id.* 730

3. It is not indispensable that the defendants shall have a co-extensive common interest in the right in dispute, or that each shall have acquired his interest in the same manner or at the same time: but there must be a general right in the complainant, in which the defendants have a common interest, which may be established against all who controvert it, by a single issue. *Id.* 730
4. The rule with regard to multifariousness, whether arising from the misjoinder of causes of action, or of defendants therein, is not an inflexible rule of practice or procedure, but is a rule founded in general convenience, which rests upon a consideration of what will best promote the administration of justice without multiplying unnecessary litigation on the one hand, or drawing suitors into needless and unnecessary expense on the other. *Id.*, 730
5. The Morris canal enters into and crosses the Rockaway river at Dover. The crossing is effected by means of a dam in the river, which holds the water at the place of crossing at a height suitable to carry boats across the river and to supply a head of water in the lower level of the canal. M. is the owner of a rolling-mill situate on the Rockaway river and driven by its waters, which, after passing the water-wheel, are discharged into the river above the canal dam. H. is the owner of a grist-mill, saw-mill and forge situate on the river below the canal dam and driven by the waters of the river. V. and W. were the lessees of H.'s mills and forge. M. sued the company for injuries arising from back-water upon the wheel of his rolling-mill. H. and his tenants also brought suits to recover damages for diversion of the water from the mills and forge. The company filed a bill of peace, to enjoin the prosecution of said suit, and for the determination of the rights of the parties respectively in one suit, to be prosecuted under the direction of the court of chancery. The charter of the company authorized the appropriation of private property to its use without compensation first made, and gave individuals who were injured thereby a right of action to recover compensation for their injuries.—*Held*, that there did not appear to be such a unity, either in the grounds on which the several actions of the defend-

Bill of Peace—Continued.

ants rested, or in the defences proposed to be made thereto, as would make a bill of peace, and an issue thereunder, the appropriate method of settling the questions involved. *Id.*, 730

Bonds.

1. In equity, an obligee is entitled to recover the full amount due on his bond, though it may exceed the penalty. *Hutchinson v. Swartsweller*, 205

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Charity.

1. The word "benevolent," intrinsically considered, includes more than legal charities, but its signification may be narrowed by the context. *De Camp v. Dobbins*, 671

2. Where the will limited the trust to a church "to aid the missionary, educational and *benevolent* enterprises to which the church is in the habit of contributing," and it was shown the enterprises referred to were legal charities,—*Held*, that the word "benevolent" could not, in this text, have a signification wider than the word "charitable" and, consequently, the trust was valid. *Id.*, 671

Chattel Mortgage.

See FIXTURES; MORTGAGE, 12.

Condition.

1. A condition in a decree of the court of appeals, that complainants should bring suit within six months after the entry of such decree,—*Held*, to have been fulfilled where a suit was, in fact, instituted by them before the entry of such decree, and duly proceeded in afterwards, and the bill therein having been dismissed on demurrer, another suit for the same object was, without unreasonable delay, begun and prosecuted. *Stover v. Wood*, 418

See DIVORCE, 5.

Corporation.

1. Bill to foreclose. Defence, usury.—*Held*, that where the lender is a corporation, and the agent in making the loan is its officer, and it is shown that a premium was paid to the latter for the loan in pursuance of a contract made by him with the borrower in the name of and for the corporation, it must be assumed, in the absence of proof to the contrary, that the premium was paid to and received by the corporation. *Dime Savings Institution v. Mulford*, 99

2. The supplement (approved February 28th, 1849) to the act concerning corporations (*Nix. Dig. 169, Rev. p. 186*), which provides that all companies incorporated under the laws of this state, whose charters do not designate their places of meeting, shall hold their business meetings, the meet-

Corporation—Continued.

- ings of their directors, &c., in this state, by its terms does not apply to companies whose charters are not subject, by the terms thereof, to alteration, modification or repeal. *Coe v. New Jersey Midland R. R.*, 105
3. The lien given to laborers by the act concerning corporations (*Rev. p. 188 § 63*), cannot be extended so as to impair the obligation of contracts or lien of duly recorded encumbrances antecedent to the act. *Id.*, 105
4. A resolution of a corporation authorizing the acceptance of a conveyance of lands on which the corporation held a mortgage, in satisfaction of the mortgage,—*Held*, valid, although no entry thereof was ever made on the minutes, and the secretary did not remember the fact of its passage, it being satisfactorily proved otherwise. *McMichael v. Brennan*, 496
- See EVIDENCE, 3; DEBTOR, 1; RAILROADS.*

Constitution.

- Art. IV, § 7, ¶ 9..... 723
- Art. IV, § 7, ¶ 10..... 266
- Art. IV, § 7, ¶ 11..... 489
- Art. X, § 1 265
- See MUNICIPAL CORPORATIONS, 3.*

Contract.

See JURISDICTION, 1; ASSIGNMENT, 5; CORPORATION, 3; PENALTY.

Costs.

1. When a suit is necessary in the proper administration of a fund given by will, its costs and a reasonable counsel fee may be allowed, out of the fund, to a suitor who makes an unsuccessful claim to the fund. *Noe v. Miller*, 234

Covenant.

1. Lands bordering on the ocean by a bluff, were conveyed expressly subject to a covenant that the grantee, his heirs &c., would not at any time thereafter build or suffer to be built, erected or moved, any building or structure on any part of the lot eastward of a designated line, and that they would not suffer to be done any act, matter or thing which might at any time thereafter in anywise obstruct or interfere with the view or prospect from the adjoining hotel of the grantor across that part of the lot, but that the grantee, his heirs or assigns, might,

Covenant—Continued.

nevertheless, erect any bough-house on the margin of the ocean bank of the lot, or any bath-house at the foot of the bank.—*Held*, that the construction of a pavilion along the entire ocean-front of the lot (even though of no greater height than a bough-house) is a violation of the covenant, both from its extent and its obstruction of the view. The fact that a portion of such pavilion extends below high-water mark, upon lands belonging to the state, is no justification for its erection in violation of the covenant. *Gawtry v. Leland*,

385

See MORTGAGE, 27; WATER RIGHTS, 3.

D.**Damages.**

See SPECIFIC PERFORMANCE, 6.

Debtor and Creditor.

1. A railroad company held its rolling stock under an agreement to pay for it in installments, the title not to pass to the company until the whole sum agreed to be paid for it should be paid, and, in case of default, all previous payments to be forfeited. It became insolvent and had no money to pay an installment which became due. Directors of the company, in order to save the rolling stock, advanced the money out of their private funds, on the strength of an agreement made by the other members of the board with them that they should be subrogated to the rights of the vendors for their repayment, but no resolution to that effect was in fact passed by the board.—*Held*, that they were entitled to subrogation, subject to the superior right of the vendors as to the unpaid balance of the price. *Coe v. New Jersey Midland R. R.*, 105
2. Taking a second security of equal degree with the first, for the same debt, does not extinguish the first, unless the creditor accepts it with that understanding. *Hutchinson v. Swartsweller*, 205
3. In order to secure the creditor of a corporation for moneys loaned and afterwards to be loaned, the owners thereof (the complainants) assigned to such creditor a controlling part of the stock, and one of them also assigned bonds owned by him individually, and the corporation gave a mortgage on its works. On a bill filed against such creditor, a bank that had discounted his notes for

Debtor and Creditor—Continued.

the benefit of the corporation and held some of his collaterals therefor, and the corporation, to redeem the stock and bonds, and for an account,—*Held*,

(1) That such bill was not multifarious.

(2) That there was no misjoinder of complainants, since all the collaterals were to secure the same liabilities, and,

(3) That a general offer to pay any amount found due, was sufficient to entitle complainants to an account.

Rennie v. Deshon,

378

4. Creditors have a right, in the first instance, without first exhausting their remedy against executors personally, to have recourse to the trade property. *Ferry v. Laible*, 566

See ASSIGNMENT; EXECUTORS, 1; INSURANCE; MARSHALLING ASSETS; PENALTY; POWERS, 7; SETTING ASIDE SALES, 1.

Decree.

1. A defendant cannot avoid the effect of a former decree on the ground that he, as complainant therein, omitted certain *cestuis que trust* in that suit. *McGuckin v. Kline*,

454

See MORTGAGE, 25.

Definitions.

See WORDS.

Devise.

1. A testator devised to his two sons, William and Enoch, in fee, in equal shares, all his lands &c., but if either of them died without leaving lawful issue, the widow of such decedent should, so long as she remained such widow, receive one-third of the rents of the real estate devised to such decedent, and, after her decease, that real estate should be equally divided among all the testator's children then living. Enoch died after the testator, leaving a widow, but no lawful issue. By a voluntary partition between William and Enoch, certain lands were set off to Enoch as his share, and these lands Enoch afterwards conveyed to his wife, the complainant. On a bill by her against all of Enoch's brothers and sisters for an account of one-third of the rents and profits of the lands so set off to Enoch,—*Held*,

(1) That Enoch's conveyance to the complainant is no bar to her account, because Enoch's estate therein, and, of course, complainant's, was determined by his death without lawful issue.

Devise—*Continued.*

(2) That complainant is not entitled to an account of the rents and profits against those of Enoch's brothers and sisters who have not been in possession of the premises, nor received any part of the rents.

(3) That a receiver will not be appointed, since the complainant may obtain possession of her portion of the premises and manage it for herself. *Swallow v. Swallow*, 390

2. There is a marked distinction between the purposes shown by a specific devise of real estate and a devise by way of residue. The first shows that the testator means the devisee shall have a thing certain; the other, that the devisee shall have something which is uncertain or unknown, and cannot be described with certainty.

Anderson v. Anderson, 560

See EVIDENCE, 1.

Divorce.

1. An infant, whose parents resided in Canada, filed a bill to annul her marriage, on the ground of her husband's fraud and misrepresentation as to the effect of a Jewish ceremony performed in this state, which she, at the time, believed to be merely a betrothal. Her husband was domiciled elsewhere.—*Held*, that she was incapable of changing her own domicile, and that, consequently, the court had no jurisdiction. *Blumenthal v. Tannenholz*, 194
2. Where a wife declared to her husband, with whom she was living in her house, that he must leave the house, or else she herself would (he not having been guilty of cruelty to justify her action), his leaving her, under such circumstances, is not desertion. *Kestler v. Kestler*, 197
3. To enable a defendant to avail himself of condonation as a defence to a suit for divorce, he must set it up either by plea or answer. *Warner v. Warner*, 225
4. In case it has been omitted through mistake or unskillfulness in pleading, the court may, to prevent grave wrong, permit it to be interposed by supplemental answer, upon such terms as will afford the complainant an opportunity to disprove it. *Id.*, 225
5. Condonation is always conditional, the condition being that the pardoned party shall, in the future, treat the other with conjugal kindness. *Id.*, 225
6. The commission, subsequently, of any offence which falls within the cognizance of a matrimonial court, is a violation of the condition, and vitiates the pardon. *Id.*, 225

Divorce—Continued.

7. A bill which merely alleges that a wife deserted her husband on a certain date, and thereafter permanently separated himself from his residence, does not disclose any cause of divorce known to the laws of this state. *Case v. Case*, 131

See *Interdictio*, i.

Domicile.

1. The domicile of a legitimate, unemancipated minor is, if his father be alive, the domicile of the latter. *Blumenthal v. Transmont*, 134

See *Divorce*, i.

Dower.

1. A wife will be put to her election between a testamentary disposition in her favor and her dower, when it clearly appears from the will that the testamentary provision was intended as a substitute for the legal one, and the intention will be implied if the claim of dower would be clearly inconsistent with the will. *Stuart v. Stuart*, 136

E.**Easement.**

1. A conveyance of "all that free use of the undivided half part of the wagon-way extending one hundred feet along the said John H. Johnson's line, from the public highway; the said wagon-way to be used only for passing in and out at all proper times, but without unnecessary delay or obstruction to the said passage-way, thereby causing annoyance and damage to the said John H. Johnson, his heirs or assigns," with an *habendum* to the grantee, his heirs and assigns, to his and their only proper use, benefit and behoof forever, and with usual covenants of warranty, conveys only a right of way or easement. *Harris v. Johnson*, 174
2. An easement of light and air, supplied to the windows of one person from the premises of another, cannot be acquired in this state by a mere user for twenty years under a claim of right. *Hayden v. Dutcher*, 217

Eminent Domain.

1. Where mortgaged premises are converted into money by virtue of condemnation proceedings, the rights of the mortgagee remain unaltered and he is entitled to the

Eminent Domain—Continued.

money as an equivalent for the land. And, where the full value of the land taken has been awarded and paid into this court, equity will protect the condemner against the lien of an encumbrancer who has not been made a party to the proceedings in condemnation. The power to extend such protection does not depend on the act of 1877 "respecting the awards of commissioners in cases of lands and real estate taken or condemned by law and appeals therefrom," but is inherent in this court. *Platt v. Bright*,

81

2. A way for a road or turnpike reserved in a deed for lands, and laid down as such on a recorded map of the premises, does not authorize any company to occupy and use it as a turnpike, without making compensation. *Shippen v. Paul*,

439

See ESTOPPEL, 1; MORTGAGE, 1; RAILROADS, 7; VENDOR, 2.

Estate.

See LEGACY, 2; MORTGAGE, 11; REFORMING INSTRUMENTS, 1; REMAINDER; TENANT FOR LIFE.

Estoppel.

1. That the mortgagees of premises which it is proposed to cross by a railroad, might have known of the intention to cross, from the fact of the building of a tunnel, to enter which the crossing was necessary, will not bind them to the consequences of acquiescence. In estimating damages, the value of the crossing, which was the consideration of the agreement, will be allowed. *Coe v. New Jersey Midland R. R.*,

105

2. F., a creditor of B., brought suit on his demand. T., another creditor of B., put his claim in the hands of an attorney for collection. The attorney proposed to F. to obtain an assignment from B., to secure both claims, and F. assented thereto. Subsequently B. made a general assignment for the benefit of all his creditors, which, however, was never delivered.—*Held*, that F. was not thereby estopped from prosecuting his suit. *Taylor v. Brown*,

163

3. A judgment at law was recovered by the complainant against the defendant and one M., on a joint and several promissory note given by them to complainant, for a partnership debt. At the defendant's repeated requests, and on his promise to pay one-half of the judgment and costs if he would do so, the complainant obtained from M. payment of one-half and released him from all liability on the judgment.—*Held*, that the defendant should

Estoppel—Continued.

- be enjoined from taking advantage at law of such release to cancel the judgment, and thereby avoid the payment of his share. *Cregar v. Cramer*, 375
4. A provision in complainant's mortgage that he should apply the rents &c. derived from the premises to satisfy his mortgage, does not preclude him from showing that he did apply such rents in part to other prior or concurrent encumbrances thereon. *Denman v. Nelson*, 452
5. To constitute an equitable estoppel, the defendant must have done an act, or made an admission, the natural effect of which was to influence the conduct of the complainant, and which has induced him to change his position or condition, so that, if the defendant is afterwards permitted to deny the truth of his words or conduct, the complainant must suffer harm. *Mutual Life Ins. Co. v. Norris*, 583
6. Where the complainant's act (which he says he was induced to do by the defendant's representation or act) appears to be rather the result of his own will or judgment than the product of the defendant's representation or act, there can be no estoppel. *Id.*, 583

See DECREE; MORTGAGE 17; VENDOR 3.

Evidence.

1. In a suit against devisees and executors to set aside a deed to the testatrix, alleged to have been obtained by her by fraud, the complainants are not competent witnesses. *Montgomery v. Simpson*, 1
2. A testator made no claim to certain property during his life-time, nor by specific devise in his will. His general devisees brought a suit to set aside deeds for the premises, executed by the testator, by whom the title was held in trust. *Query*, whether the defendant was a competent witness, exception being taken to his testifying because the complainant was suing in a representative capacity. *Petty v. Petty*, 8
3. With a view to recording, a corporation mortgage may be proved by the president or secretary, if signed by them, though they signed it by order of the board of directors. They may be regarded as subscribing witnesses within the meaning of the act respecting conveyances (*Rev. p. 152 § 4*). But it cannot be proved by one who did not sign the mortgage. It is not requisite to a compliance with the statute in regard to proof of such

Evidence—Continued.

- instruments, that it should appear that the contents of the instrument were made known to the mortgagor. A record of a mortgage made by transcription from a copy of the mortgage examined by the clerk on production to him of the original, is in conformity with the requirements of the statute. *Coe v. New Jersey Midland R. R.*, 105
4. A citizen of another state, who comes into this state voluntarily and without subpoena, for the purpose of giving evidence in a suit pending in this court, can not be taken on a *ca. sa.* while he remains here as a witness. *Jones v. Knauss*, 211
 5. His arrest, at any time while the court may require his attendance before it as a witness, is an invasion of its prerogative, for which it may discharge him. *Id.*, 211
 6. Evidence taken on a preliminary matter, especially before issue joined, can not be read on final hearing, except under an order of the court. *Warner v. Warner*, 225
 7. Secondary evidence of the contents of a written instrument, although not strictly competent at the time when offered,—*Held*, to have been rendered so in this case, under the circumstances, by a subsequent admission of counsel that the original was lost or destroyed. *Culver v. Culver*, 448
 8. Depositions as to facts neither admitted nor denied by the answer, are admissible both at the hearing and before the master on an accounting. *Denman v. Nelson*, 452
 9. If a party to a suit is proved to have destroyed a written instrument, a presumption arises that, if the truth had appeared, it would have shown that the paper contained something prejudicial to his interest, and, in such a case, slight evidence of the contents of the paper will usually be sufficient. *Jones v. Knauss*, 609
 10. Evidence of oral admissions and declarations, belongs to a class of proofs which should be received with great caution. *Id.*, 609

See CORPORATIONS, 4; VARIANCE; WILLS, 5.

Executors and Administrators.

1. Creditors, although they have obtained judgment against administrators, were not, previous to the adoption of *Rule 11* of the orphans court, entitled to notice of an application by such administrators to be discharged from their trust, on account of the insolvency of themselves and their sureties. *Union Bank v. Poulson*, 239

Executors and Administrators—Continued.

2. A discharge for such cause is not invalid because granted before an account rendered, since such discharge does not relieve from that duty. *Id.*, 239
 3. That the orphans court, which granted letters testamentary, did not require security from an executrix, because she had remarried, constitutes no objection to her proceeding in this court. *Oliva v. Bunajorza*, 395
- See* DEBTOR, 4; EVIDENCE, 1; PARTIES, 2; REMAINDERS; SETTING ASIDE SALES, 1; TENANT FOR LIFE.

F.**Fixtures.**

1. Cotton machinery, such as Danforth spinning-frames, twisting-frames &c., though fastened to the floor by nails or screws, or held in position by cleats,—*Held*, to be personal property, and to pass under a chattel mortgage thereof, as against a mortgage of the realty subsequently given, describing the property as "all those certain mills, factories &c., and all the machinery and fixtures in the same." *Keeler v. Keeler*, 181
2. Personal property included in the chattel mortgage, but incorporated with the realty,—*Held*, not to pass by the chattel mortgage as against a subsequent mortgage of the realty. The property was a steam-engine, securely and permanently bolted to a foundation set in the ground, with the boilers as a necessary adjunct thereto, together with the shafting, belting, couplings and pulleys to communicate the power; also, water-wheels and a water-wheel governor. A gas-generator, situated in a pit in a building constructed for it on the premises, the gas-pump connected with it, and the pipes, were also included. Also, gas-burners, as not being furniture, but mere accessories to the mill. Also, steam-heating-pipes laid on hooks attached to boards fastened to the walls, and heating-pipes, part of the system of piping, which merely rested upon the floor, without being attached to it. *Id.*, 181
3. The fact that property personal in its nature, but not incorporated with the realty, has, in transmission, been passed merely by the deed for the land, does not establish its character. Its character is not affected by long-continued localization alone. *Id.*, 181

See ASSIGNMENT, 4.

Fraud.

1. A purchaser at a public sale of lands, contrived and carried out in order to defraud the creditors of the owner, is bound by the fraudulent acts of those who represented him in the transaction, although he was not personally present, and swears that he was ignorant as to the conduct of the sale. *Lund v. Equitable Life Assurance Soc.*, 355
 2. Lands were conveyed to a mortgagee in consideration of his cancelling a mortgage thereon given by the grantor and his wife. They fraudulently cancelled the existence of a judgment obtained against them by collusion, and levied on the premises the day before the transfer.—*Held*, that the cancellation should be set aside, and the lien of the mortgage re-imposed on the lands, and that the judgment creditor be restrained from selling the premises except subject to the mortgage. *Young v. Hill*, 429
- See FRAUDULENT CONVEYANCES; JURISDICTION, 6; PLEADING, 5; SETTING ASIDE SALES, 1;

Fraudulent Conveyances.

1. A defendant who merely defends his title to lands when attacked, cannot be deprived of the protection of the court, although the legal title may have been put in another's name in order to keep the property away from his creditors. In the case in hand the defendant paid for the property in question with his own money, and the title was taken by his trustee directly from the seller. *Petty v. Petty*, 8

See ASSIGNMENT.

G.**Gift.**

1. A son who occupies towards his mother a position of trust and confidence, is bound, if his mother desires to make a deed of gift to him for a large part of her estate, to see that the deed, in all substantial particulars, conforms to her intention, and that she fully understands its nature and effect; otherwise the deed will be set aside. *Mulock v. Mulock*, 594

Guardian.

1. It is no proof of waste, in a proceeding to remove a guardian who is personally responsible, that he has incurred liability to pay counsel fees in a controversy over his management of the ward's property, since such fees, if unlawful or unnecessary, may be disallowed in his

Guardian—Continued.

account; nor, that he has paid reasonable commissions to a broker for renting and collecting the rent of his ward's real estate. *Flinn's Case*,

640

See ORPHANS COURT, 2.

H.**Heirs.**

See PARTIES, 7.

Husband and Wife.

1. The claim of a wife for money handed over by her to her husband, without any definite agreement between them, at the time, as to its repayment,—*Held*, invalid, under the circumstances, as against her husband's creditors.

Clark v. Rosenkrans,

665

See DIVORCE; EXECUTORS, 3; MORTGAGE, 31; PARTIES, 2; PLEDGE.

I.**Infant.**

See DIVORCE, 1; DOMICILE; PARENT AND CHILD.

Injunction.

1. Where an answer explicitly and fully denies the grounds on which an injunction has been granted, it must be dissolved, although exceptions to other parts of the answer have been filed. *Stitt v. Hilton*,

285

See RAILROADS, 10, 11.

Insolvency.

See EXECUTORS, 1; INSURANCE; MORTGAGE, 7; RAILROAD, 4; SPECIFIC PERFORMANCE, 2.

Insurance.

1. The charter of a mutual life insurance company provided that in case of losses exceeding the funds on hand, the policy-holders should be assessable, *pro rata*, therefor, and liable to forfeiture of their policies for non-payment of such assessments, which were also made collectible by suit, provided the assessment should not exceed the amount of the note or obligation given by them. The company was, by this court, decreed to be insolvent.—*Held*,

(1) That claims arising before the decree was entered (on ordinary policies by death and on endowment policies

Insurance—Continued.

whereon payment had been made of all that could ever be payable), were entitled to be paid as debts, in the order in which they severally accrued, and that the other policy-holders were subject, under the charter, to assessment to satisfy such claims, notwithstanding the insolvency of the company.

(2) That the holders of similar claims arising after such decree, were not to be considered as creditors of the company, nor payable as such.

(3) That the condition of insolvency is not, in such case, of itself, destructive of the obligation to contribute.

(4) That a policy-holder might not set off against his own bond and mortgage, representing a debt due from him to the company, the amount of premiums paid by him to the company on a policy not yet due. *Vanatta v.*

New Jersey Mut. Life Ins. Co.,

15

See MORTGAGE, 31.

Interest.

1. Where an account extending over a number of years was ordered, and the rate of interest during that time had been changed by law,—*Held*, that the interest payable on the accounting must conform to such fluctuations.

Wilson v Cobb,

91

See LEGACY, 5; MORTGAGE, 3, 6; TENANT FOR LIFE, 2; VENDOR, 4.

J.**Joint Tenants.**

See LEGACY, 2.

Jurisdiction.

1. Where neither of the parties to a marriage resides here, this court will not take jurisdiction of a suit to annul the contract on the ground that the contract was made here. *Blumenthal v. Tannenholz,*

194

2. Chancery has no jurisdiction, in the absence of specific equities, over assessments made in the course of municipal improvements. *Jersey City v. Lembeck,*

255

3. The right to superintend the making of such assessments, is a common law right vested in the supreme court by the constitution, and such power cannot be transferred, by legislation, to the court of chancery. *Id.,*

255

4. In a replevin suit brought by M. against C. H., after a dissolution of his partnership with C. H. Jr., alleging fraud

Jurisdiction—Continued.

- in obtaining the goods replevied, a judgment was given for C. H. Afterwards, in trover against C. H. Jr. for the same goods (additional evidence of the fraud having been discovered), M. obtained a verdict. An injunction was thereupon issued, restraining C. H. from further proceedings on a judgment obtained by default, by C. H. against M. and his sureties on the replevin bond.—*Held*, that the injunction ought to have been refused, (1) Because the bill did not show *when* the additional evidence of fraud was discovered, and that it was too late to apply at the same term of court (as required by rule) for a new trial in the replevin suit, and (2) That such evidence was material, relevant and not cumulative. *Hannon v. Maxwell*, 418
5. Where no special grounds for the interference of equity are shown, parties claiming an exemption from the assessment of a tax by reason of a special statute, must apply to a court of law for relief. That a great many tax-payers will be affected by such assessment will not, of itself, give equity jurisdiction. *Hoboken Land & Improvement Co. v. Hoboken*, 461
6. In a case of fraud,—*Held*, that this court has jurisdiction to restrain the payment of moneys in the hands of a sheriff of this state, under proceedings of foreclosure in this court, or the assignment of mortgages on lands in this state by a defendant, although both parties are residents of another state. *Tomson v. Tomson*, 464
7. Where a complainant has, by laches, lost his remedy at law against an assessment illegal but not void, this court will not interfere on the ground that the defendants threaten and intend to sell his property under it. *Cleveland v. Essex Public Road Board*, 473
- See DIVORCE, 1; EMINENT DOMAIN, 1; MUNICIPAL CORPORATIONS, 3; ORPHANS COURT, 2; RAILROADS, 8; SPECIFIC PERFORMANCE, 6.

L.**Legacy.**

1. Under a bequest "to A. and his heirs," A. usually takes the whole, absolutely; but if it be "to A. and his children," the children take with their parent. *Noe v. Miller*, 234
2. Under a bequest to two or more persons, by name or as a class, without more, they take as joint tenants; but slight evidence of an intention on the part of the testa-

Legacy—Continued.

- tor to confer distinct interests, will make them tenants in common. *Id.*, 234
3. Testator gave his daughter E. one-twelfth of his estate, directing that it should not be subject to the control of her husband, but should be hers and her child's or children's.—*Held*, that the daughter took a life estate, with remainder to her children. *Id.*, 234
4. Gifts to "my beloved sons," naming three persons, are good, although two of them are illegitimate. *Stewart v. Stewart*, 398
5. A legacy charged on residuary realty and personalty was given to executors in trust, to pay the income to testator's son for life, and after his death to divide the principal among the son's children. There was not sufficient personalty, after paying debts, to pay the legacy in full.—*Held*,
- (1) That sufficient real estate must be sold to raise the amount of the legacy.
- (2) That the son, being an adult, was entitled to interest thereon only from one year after testator's death.
- (3) That interest was payable on the whole amount of the legacy, although only a part of it had been realized. *Miller v. Sandford*, 427
- See POWERS*, 1.

Lien.

See CORPORATIONS, 3; *EMINENT DOMAIN*, 1; *MORTGAGE*, 14, 15; *VENDOR*, 2, 7-10.

Limitations.

1. Complainant filed a bill for an account under an agreement made in 1868 with I. B. C., to pay him one-eighth of the profits realized by I. B. C. in a certain contract by I. B. C. and S. H. to build a railroad. The road was finished in 1869, and I. B. C. and S. H. made their final settlement in 1874, although litigation as to part of their compensation was not ended until 1877. Complainant's bill was filed in November, 1877. In June, 1875, I. B. C. paid complainant \$175 on account of his share of the profits.—*Held*, that the right to an account was not barred by the statute of limitations, because it did not begin to run until 1874, the date of the final settlement between I. B. C. and S. H., and the bill was filed within six years from that time; and, also, because of the payment by I. B. C. to complainant in 1875. *Culver v. Culver*, 448
- See VENDOR*, 9.

Lunacy.

1. In a return to a writ *de lunatico inquirendo*, that the alleged lunatic "is a lunatic and of unsound mind, and does enjoy lucid intervals, so that he is not capable of the government of himself, his lands, tenements, goods and chattels." the phrase italicised, whether read parenthetically or not, is not objectionable either in form or fact. *Hill's Case*, 203

See WILLS, 3.

M.**Marshalling Assets.**

1. To secure an existing indebtedness, a deed (in fact a mortgage) was given by D. to J. By an error in the description, it covered only eleven feet of the frontage of one of the lots. Other creditors afterwards recovered judgments against D., and levied on the lot as described in J.'s deed. Then J. recovered a judgment against D., for the same debt, and levied on the whole lot, the mistake having been, meanwhile, discovered and rectified by another deed from D. to J.—*Held*, that J.'s lien on the eleven feet was prior to that of the other judgment creditors, by virtue of his mortgage, and on the remainder of the lot, by virtue of the levy under his judgment. *Lovejoy v. Lovejoy*, 55
2. Generally, when the personal estate has been exhausted, the residuary real estate is bound to contribute first to the payment of debts, and it is not until the residuary real estate has proved insufficient that the specifically-devised estates become liable. *Anderson v. Anderson*, 560
3. If executors, carrying on business pursuant to the direction of the will of their testator, misappropriate the trade assets in the erection of buildings on lands of the testator not embarked in the business, a court of equity may, according to established methods of procedure, compel restitution of such assets, either by directing payment or a sale of the land. *Ferry v. Laible*, 566

See MORTGAGE, 8.

Maxims.

- Equity will not take upon itself to settle legal rights..... 270
 He who gets the benefit of a fund ought to bear its burden..... 209
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Maxims—Continued.

<i>Quicquid plantatur solo etc.</i>	34
<i>Sic utere tuo etc.</i>	390
Whoever grants a thing shall be understood etc.....	219

Mechanics Lien.

1. A depot building,—*Held*, as against a mechanics lien, to be property connected with the line of the railroad, and regarded as part of the mortgaged premises which were described by a general description covering the railroad and land, ground, depots, station-houses &c., acquired and to be acquired. *Coe v. New Jersey Midland R. R.*, 105
2. A provision in a building contract that the contractor should not, without the written consent of the owner, assign any of the moneys payable thereunder, under penalty of forfeiture &c., is for the benefit and protection of the owner alone, against the dereliction or insolvency of the contractor, and if an installment of the moneys not yet due be assigned to materialmen, and notice thereof given to the owner without his exception, subsequent creditors of the contractor can derive no advantage therefrom. *Burnett v. Jersey City*, 341
3. Where a building contract was duly filed, and, after the building was completed, the premises were *bona fide* conveyed by the owner to the contractor,—*Held*, that a materialman has no lien on the premises for materials furnished in erecting a building thereon, and that a judgment recovered on such claim gives no greater right. *Scudder v. Harden*, 503

Merger.

See DEBTOR, 2; VENDOR, 2, 8.

Mistake.

See ACCIDENT.

Mortgage.

1. The power of eminent domain confers the right to take property on making just compensation, and that compensation in such case is, so far as the value of the land is concerned, to be estimated as of the time when possession was taken, and therefore cannot include the value of improvements subsequently put upon the property by the party entering under the right. But where, as in this case, the entry was not under that right, the right to take the property on compensation does not exist, and the party entering and improving does both,

Mortgage—Continued.

- subject to the right of the mortgagee whose mortgage was on the property, to sell, for the payment of his debt, the land and the permanent improvements incorporated with it. In the one case the maxim "*Quicquid plantator solo, solo cedit*," is not applicable; in the other it is. *Price v. Weehawken Ferry Co.*, 31
2. The Erie Railway Company constructed a track over a part of certain premises which were covered by a prior mortgage duly recorded. The track was built, not under ordinary condemnation proceedings in eminent domain (on the contrary there was an express inhibition in their charter against occupying those lands), but under a grant of right of way from the mortgagors.—*Held*, that the company had no right to have the track &c. put on the premises by them, reserved from a sale under foreclosure of the mortgage. *Id.*, 31
3. In a suit by an assignee to foreclose a mortgage held by him as collateral security for non-payment of interest on the bonds, the mortgagee or his assignee cannot set up that the mortgage does not provide that the principal shall become due on the non-payment of the interest, the mortgagor, who was a party, not having interposed such defence. *Ackerson v. Lodi Branch R. R. Co.*, 42
4. Where a mortgagee in possession assigns the mortgage, the mortgagor, who has no actual notice of the assignment, is entitled, as against the assignee, to an account of the rents and profits up to the time of recording the assignment (but not afterwards), and to have them applied on the mortgage debt. *Id.*, 42
5. A party defendant in a foreclosure suit cannot be held liable for a deficiency prayed against him in the bill, unless a ticket or notice to that effect be served on him with the subpoena to answer, in compliance with *Rule 53*. *Id.*, 42
6. A complainant's right to interest as well as principal, under a foreclosure decree,—*Held*, not to be affected by a decree in another suit to establish the title to the premises as between the defendant and third parties, in which the decree declared that complainant's mortgage was a lien on the premises for the amount of the principal only. *Mut. Ben. Life Ins. Co. v. Jackson*, 50
7. After a decree in foreclosure and execution issued against an insolvent corporation, it quarried certain stone on the premises covered by the mortgage, which stone

Mortgage—Continued.

still remained on the ground.—*Held*, that, as between the mortgagor and mortgagee, such stone was subject to the mortgage.—*Held*, also, that, under the circumstances, it was subject to the prior lien, under the statute, of the quarrymen's wages. *American Trust Co. v. North Belleville Quarry Co.*,

89

8. The holder of a second mortgage, payable in three installments, filed his bill to foreclose for the payment of the second installment and interest thereon and costs. The first installment had been satisfied by means of a collateral mortgage. The third installment was not due. The bill alleged that the property was indivisible, and decree was taken for the sale of the whole, to pay the amount of the second installment and interest and costs, as prayed by the bill. A subsequent mortgagee (the third) purchased the decree, and took an assignment thereof. The property was not sold under the execution. The third installment becoming due and being unpaid, the complainant filed his bill for foreclosure and sale of the whole premises, to pay it.—*Held*, that the court would direct a sale of the property under the former decree, and apply the surplus, as far as necessary, to the payment of the third installment. The property was to be sold subject to the first mortgage, which was not foreclosed. *Allen v. Wood*,

103

9. A foreclosure suit is not a proper proceeding in which to litigate the rights of a party claiming title to the mortgaged premises in hostility to the mortgagor. Therefore, where defendants, who were permitted to intervene in a foreclosure suit upon a mortgage made by a railroad company formed by the amalgamation or consolidation, pursuant to legislative authority, of certain existing railroad companies, sought to question and litigate the validity of the consolidation,—*Held*, that that defence would not be entertained. *Coe v. New Jersey Midland Railway Co.*,

105

10. A provision in a corporation mortgage that the principal shall become due in case default be made in the payment of interest, is not in contrariety to a resolution authorizing the giving of the mortgage, which merely provides that the mortgage shall be given to secure the payment of the principal at a certain time, with interest payable semi-annually. *Id.*,

105

11. Where an act of the legislature authorizing a railroad corporation to give a mortgage, evidently contemplates a

Mortgage—Continued.

- mortgage of all the estate of the company, it will be held, unless the contrary appear, that the mortgage given under the authority was intended to and did convey the estate to the full extent contemplated or authorized by the act. *Id.*, 105
12. A chattel mortgage on the equipment of a railroad, made by authority of the board of directors of an insolvent corporation, for securing the claims of directors against the corporation,—*Held*, to be invalid as against prior mortgagees of the franchises and equipment, whose mortgages were not filed (the transaction was prior to the act of 1876, *Rev. p. 924 § 86*), because the directors (they were also stockholders) had notice of the prior mortgages. Such prior mortgages, however,—*Held*, not to be valid against judgment creditors who, but for the receivership obtained in a suit to foreclose one of the mortgages, might have made a lawful levy valid on the equipment. *Id.*, 105
13. That the trustees under a railroad mortgage which gave them the right to take possession of the mortgaged premises in case of default of payment of interest, did not see fit to take possession after default, but permitted the mortgagors to continue in possession and operate the road, and the fact that the employes of the mortgagor were not aware, when they rendered the service, that default had taken place, gives to the latter no claim against the mortgagees for their wages. *Id.*, 105
14. Accepting the mortgagor's note for interest due on a mortgage, does not pay the debt nor discharge the lien. *Hutchinson v. Swartsweller*, 205
15. Where a first mortgagee accepts a new mortgage, and surrenders a prior one for cancellation, in ignorance of the existence of an intervening lien, equity, in the absence of laches or other disqualifying fact, will restore him to his original position. *Id.*, 205
16. Priority of record will not give a right of preference in payment to one of two concurrent mortgages, if both are held by the same person. *Vredenburg v. Burnet*, 229
17. If one of the two is assigned by the mortgagee, upon a representation that it is the first lien upon the premises, such representation will make it so as against the assignor. *Id.*, 229
18. But as against a subsequent assignee of the other, without notice, such representation is a secret equity by which he will not be bound. *Id.*, 229

Mortgage—Continued.

19. An assignee of a mortgage takes it subject to all the defences which the mortgagor, or those who have succeeded to his rights, may urge against it, but free from secret equities created by the mortgagee in favor of third persons. 229
20. A covenant by a grantee of mortgaged premises to assume and pay the mortgage debt contained in his deed of conveyance, is a contract with his grantor, only for the indemnity of the latter, and may be released and discharged by him. *Youngs v. Trustees for the Support of Public Schools,* 290
21. After a release by the grantor of the covenant to assume and pay the mortgage debt, if before bill filed, the mortgagee cannot have the benefit of the grantee's contract of assumption, to found on it a decree against the latter for a deficiency, unless, before the release was executed, the mortgagee had acquired an equitable right in the contract, or the release be impeached as being made in fraud of creditors. *Id.,* 290
22. A voluntary release, by the grantor, of the covenant to assume and pay &c., made without consideration, in anticipation of bill filed, and for the express purpose of releasing the grantee from liability for deficiency, will not, for that reason, be invalid; *secus*, if the grantor be insolvent, and the effect of the release is to hinder or defraud creditors by depriving them of the means which the debtor had in his power to make available for the payment of debts. *Id.,* 290
23. A party who has assumed responsibility for a mortgage debt, either as mortgagor or by a subsequent assumption of liability, and has conveyed the mortgaged premises, taking from his grantee a covenant to pay the mortgage debt, has no more right to divest himself, by a voluntary release of the covenant of indemnity against his liability for the mortgage debt, than he would have to surrender, without consideration, a covenant against encumbrances, or a promissory note, or to give up property or rights of any other description which might be made available in satisfaction of debts. But this disability to release arises only on the happening of insolvency, and when creditors are thereby hindered or deprived of the means of collecting their demands. *Id.,* 290
24. On a bill filed for the foreclosure of a mortgage, praying a decree against a grantee of the mortgaged premises for

Mortgage—Continued.

- deficiency, if the covenant to assume has been released, and the mortgagee seeks to avoid the release for fraud, the bill should be framed in that aspect, and make an issue on the fraud. *Id.*, 290
25. Where there are successive grantees of the mortgaged premises, each assuming payment of the mortgage debt, the decree for deficiency should determine and adjudge the order of the liability of the several grantees, especially where matters occurring between the parties may require a marshalling of securities. *Id.*, 290
26. An alleged mistake in the description of lands in a release of part of premises covered by a mortgage, such release having been given by the mortgagee, cannot, on foreclosure, be set up to the detriment of an assignee of the mortgage. *Appleton v. Small*, 382
27. The covenant under which an equitable mortgage is claimed, included all of the covenantor's property, both real and personal, and especially a certain house and lot, describing it.—*Held*, that it was valid. *Oliva v. Bunaforza*, 395
28. The title of the assignee of a mortgage, whose assignment has been duly recorded, is not affected by a subsequent assignment of the same mortgage to a third party, by his assignor, who had obtained possession thereof under pretence of collecting the interest on it. The record of such assignment was notice to the latter. *Stein v. Sullivan*, 409
29. Where the mortgaged premises were described as containing one hundred acres of land, another tract of nine acres, the title to which was derived from another source, cannot be claimed as covered by such mortgage, although the description in the mortgage concluded with a general reference to a deed which conveyed both tracts. *Holmes v. Abrahams*, 415
30. A release of mortgaged premises to a person having no actual notice of the assignment of a mortgage is, by statute, valid if such assignment has not been recorded. But the cancellation of such mortgage by an attorney at law, under a supposed authority from the mortgagee (the evidence as to the mortgagee's direction was conflicting, and a mortgage which complainant claimed was to have been substituted for the original, was never delivered),—*Held*, to be invalid as having been unauthorized, and set aside. *Tradesmen's Building Ass'n v. Thompson*, 536

Mortgage—Continued.

31. A first mortgage was given to a building society, and certain shares of its stock afterwards surrendered by the mortgagor. The mortgage authorized an insurance of \$1,000 on the premises, at the expense of the mortgagor. A fifth mortgage thereon, given to a married woman, was assigned as collateral security, to three different persons, whose assignments were duly recorded. The third assignee was also the assignee from the lessor of a lease of the premises, executed six days after the bill was filed. A receiver of the rents was appointed, *pendente lite*, on foreclosure of the fifth mortgage.—*Held*,

(1) That neither the mortgagor, nor the third assignee of the fifth mortgage, could attack its assignments on the ground that it had been assigned by a married woman to secure her husband's debts.

(2) That the holder of the first mortgage could only recover the sum due thereon after deducting the withdrawal value of the shares when surrendered.

(3) That he could only recover the premiums paid for insurance to the extent of \$1,000.

(4) That the assignees of the fifth mortgage were entitled to be paid in the order in which their several assignments were recorded.

(5) That the rents of the premises accrued since the receiver's appointment, go to him for the benefit of the mortgagees. *Conover v. Grover*,

539

See EMINENT DOMAIN, 1; ESTOPPEL, 1, 4; EVIDENCE, 3; FIXTURES, 1, 2; MECHANICS LIEN; MUNICIPAL CORPORATIONS, 1, 4, 5; PLEADING, 2, 5; POWERS, 6; SETTING ASIDE SALES, 3.

Municipal Corporations.

1. The charter of the city of Elizabeth of 1863, § 73, provides that any taxes thereafter assessed on lands, shall be a lien for two years, paramount to any encumbrance thereon; and, by § 83, such lands may be sold for the lowest term of years (but in no case exceeding *fifty years*) for which any person will take the same and pay the amount of the taxes and charges; and, by another clause of § 83, such lands, if not bid for when offered at public sale, shall be struck off to the city for the term of *fifty years*. By a supplement of 1873, the limitation as to time contained in the *first clause* of § 83, is repealed. For non-payment of taxes for 1872, 1873 and 1874, on certain lands, they were struck off to the city

Municipal Corporations—Continued.

in each year for a term of *nine hundred years*. The complainant's mortgage on the premises was given in January, 1872, and a second mortgage thereon in June, 1872. The second mortgagee redeemed the lands, in July, 1875, by paying the taxes and charges and interest up to that time, took possession, and afterwards paid the taxes for 1875, 1876 and 1877, and collected the rents.—*Held*,

(1) That the sale to the city, because it was for a term (nine hundred years) unauthorized by law, was void, and that the second mortgagee could derive no title therefrom.

(2) That the second mortgagee must account for the rents and profits, to the end that it may appear whether anything is due to it for taxes paid. In the account, it will have credit for necessary repairs, and for any balance in its favor it will be entitled to a lien paramount to the complainant's mortgages. If there shall appear to be a balance in its favor after charging it with all taxes assessed, though not paid, the balance will be credited on its mortgage. In the account, as between it and the complainant, it will not be allowed for insurance premiums paid by it for its own security merely. Interest on taxes paid by it when it went into possession, and subsequently thereto, will be allowed at the lawful rate, *i. e.* at seven per cent. per annum up to July 4th, 1878, and six per cent. afterwards; and allowance will be made for interest paid by it on taxes which were a lien when it went into possession, but not at a rate exceeding that fixed by the charter on taxes paid before sale.

Schatt v. Grosch,

199

2. A charter provided that the damages for any improvement "be fairly and justly assessed by commissioners."—*Held*, that the court would not presume that the amount of damages assessed exceeded the benefits, merely because the commissioners' report omitted to state that fact.

Sutphin v. Trenton,

468

3. Municipal assessments that are unconstitutional, and consequently void, and the sales of lands thereunder, may be set aside in equity. *McClave v. Newark*,

472

4. Under the charter of Jersey City, the lien of mortgages is subject to that of taxes and assessments for improvements subsequently laid. *Hardenbergh v. Converse*,

500

Municipal Corporations—Continued.

5. Where a municipal charter does not directly declare that taxes shall be a lien paramount to mortgages on the lands assessed, such priority cannot be claimed from the mere fact that the charter allows mortgagees to redeem the premises after a tax sale. *O'Neill v. Dringer*, 507
6. Under the eighth section of the general telegraph law, the authorities of an incorporated town have a right to designate the street route on which a telegraph line shall pass through the town, but they have no right to refuse to allow the line to pass at all. *American Union Tel. Co. v. Harrison*, 627
7. Where the poles of a telegraph line, in an incorporated town, are erected outside of the streets, and on private property, and the wires hung thereon, where they overhang the streets, are placed at an elevation sufficiently high not to impede, obstruct or endanger the full, free and safe use of the streets, the town authorities have no right to destroy them. *Id.*, 627
8. Under the last clause of the eighth section of the general telegraph law, the authorities of an incorporated town are authorized to prescribe regulations fixing the elevation at which telegraph wires shall cross the streets of the town, but until regulations on this subject are adopted, the authorities are not at liberty to treat such use of the streets, for that purpose, as in no way impedes or endangers their full, free and safe use, as a nuisance. *Id.*, 627

See JURISDICTION, 2, 3, 5, 7; POWERS, 2; QUIA TIMET; STATUTES.

N.**Notice.**

1. Whatever puts a party upon inquiry, amounts, in judgment of law, to notice, provided the inquiry became a duty, and would, if pursued, have led to a discovery of the requisite fact. *Vredenburg v. Burnet*, 229

See MORTGAGE, 12, 18; SOLICITOR; VENDOR, 5.

Nuisance.

See MUNICIPAL CORPORATIONS, 8.

O.

Orphans Court.

1. The nineteenth section of the orphans court act (*Rev. p. 756*), provides that when a caveat shall be filed against the probate of a will, the orphans court may, on the application of the caveators, or the persons named as executors in the will, certify the question involved in the controversy, into the circuit court of the county, for trial before a jury.—*Held*, that such certifying was merely discretionary with the orphans court, and that the provision of the act was not mandatory. *Brothers v. Pickel*, . 647
2. The orphans court has jurisdiction, upon the application of the sureties of an habitual drunkard's guardian, to inquire into the solvency of their co-sureties, and, also, into the guardian's management of the estate; and, after citation, to remove such guardian for failure to account, or for waste. *Dickerson v. Dickerson*, 652

See EXECUTORS, 1, 3.

P.

Parent and Child.

1. By statute (*Rev. p. 318*), when the parents of minor children live apart, the court may, on petition of either parent, make a decree concerning the custody &c. of such children; the parents' rights, in the absence or misconduct, are deemed equal, and the happiness and welfare of the children determine the question of their custody. A decree of divorce for cruelty granted in this court on the application of a wife who had previously separated from her husband, was reversed by the court of appeals.—*Held*, that her refusal to return to her husband afterwards was not "misconduct" within the meaning of the act. *State, English v. English*, 543
2. Where, under the above circumstances, a daughter eight years old and a son ten, preferred to remain with their mother, and she was able to provide adequately for their maintenance and education, and was, in all respects, fit to have charge of them, the court refused to change the custody, making reasonable regulations for their father's access. *Id.*, 543
3. A daughter and her mother, who was very old and infirm, lived together.—*Held*, that the former might recover

Parent and Child—Continued.

compensation from the estate of the latter for services which were indispensable and rendered under circumstances that raised a presumption that she was to be paid, and that her mother intended to pay her therefor.

De Camp v. Wilson,

656

See DOMICILE; GIFT; LEGACY, 1, 4, 5.

Parties.

1. A petition, filed by a stranger to the suit, claiming the payment of moneys paid into court in the cause, to satisfy a judgment recovered by him against the defendant in a foreign state, dismissed on the ground that the petitioner, not being a party to the suit, had no standing, and could have no relief therein, and that the proceedings for the purpose should be by bill. *Esterbrook Co. v. Ahern,* 3
2. Although the husband of an executrix is a proper party, his non-joinder cannot be taken advantage of by general demurrer. *Oliva v. Bunaforza,* 395
3. Parties having no common interest, but asserting several and distinct rights, cannot unite as plaintiffs in the same suit. *Hendrickson v. Wallace,* 604
4. A misjoinder of plaintiffs must be taken advantage of by demurrer; if the defendant answers, the objection will be considered waived. *Id.,* 604
5. But, even when so waived, if the effect of the misjoinder is such as to embarrass the court, or to prevent it from doing complete justice, the court may, of its own motion, dismiss the complaint. *Id.,* 604
6. The court will usually dismiss, when it appears that the separate interests of the co-plaintiffs are of such a nature that they are likely, in the future progress of the cause, to come into conflict, and thus transform the suit into a contest between the plaintiffs. *Id.,* 604
7. If a testamentary trust is limited to a purpose inconsistent with the statutory policy of the state, the heir at law has a right, in equity, to contest the execution of such trust. *De Camp v. Dobbins,* 671
8. This is not of that class of cases in which the public alone can intervene. *Id.,* 671

See ASSIGNMENT; BANKRUPTCY; DEBTOR, 3; DECREE.

Partnership.

1. A partner, for a valuable consideration, sold to his copartner all the effects of the firm, the latter also assuming

Partnership—Continued.

its liabilities and agreeing to indemnify the former against them. The copartner afterwards made an assignment for the benefit of his creditors, under which the assignee sold some of the firm assets, as alleged, fraudulently. Subsequently a judgment for a partnership debt was recovered against both partners.—*Held*,

(1) That the partner, by his sale, had lost all equitable lien on the partnership assets, or right to follow the proceeds of sale arising therefrom, in order to apply them in satisfaction of the judgment.

(2) That he was not in a position to question the *bona fides* of the assignment. *Vosper v. Kramer*,

420

See ACCOUNT; PLEADING, 1.

Payment.

See DEBTOR, 2; ESTOPPEL, 3; MORTGAGE, 14.

Penalty.

1. By an agreement, a judgment creditor was to accept \$30,000, in installments, in payment of his judgment of \$60,000, the debtor to withdraw a pending appeal on such judgment, and to pay the installments promptly, or, in default thereof, the judgment creditor might collect the full amount of the judgment (\$60,000) remaining unpaid.—*Held*, that failure to pay according to the agreement could not be regarded as a forfeiture or penalty which it was inequitable for this court to enforce. *Ackerson v. Lodi Branch R. R.*,

42

See BONDS.

Pleading.

1. A cross-bill is not necessary in a suit between partners, wherein the complainant seeks a dissolution and an account from the defendant, to enable the latter to get an account from the former, or to obtain relief against fraudulent practices of the complainant in giving the note of the firm without consideration, for his own benefit, and in buying up the paper of the concern at a discount, for his advantage, with a view to obtaining the full amount thereof out of the assets of the firm. Such a bill will not be sustained on demurrer. *Johnson v. Buttler*,
2. A bill that seeks to establish the lien of an equitable mortgage on lands, against the mortgagor, his grantee and a

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Pleading—Continued.

- mortgagee of the latter, with notice of such equitable lien, is not multifarious. *Oliva v. Bunaforza*, 395
3. On a hearing on bill and answer and depositions, a mere averment in the answer that the defendants "claim and charge" that the rents, issues and profits received by the complainant as mortgagee in possession, were more than sufficient to satisfy the mortgage in suit, is not conclusive on the complainant as a statement of a fact. *Denman v. Nelson*, 452
4. A bill alleged that a defendant was concluded by a decree in a former suit, and also insisted on such defendant answering the whole bill, including matters settled by that decree. The answer set up a denial of some of those matters.—*Held*, that such answer was not therefore impertinent, since it complied with the prayer of the bill. *McGuckin v. Kline*, 454
5. Fraud in the consideration of a prior encumbrance, may be set up by a mortgagee in his answer, without filing a cross-bill, and a general allegation thereof is sufficient, where the fraud alleged is that the mortgage was given to defraud creditors, and was without consideration. *Id.*, 454
6. An answer may submit legal propositions arising on facts admitted by the bill, or facts which it states. *Id.*, 454
7. A material and controlling fact which is clearly and fully averred in the bill, and not denied or alluded to in the answer, must be taken as confessed. *Jones v. Knauss*, 609
- See AMENDMENTS; DEBTOR, 3; DIVORCE, 4, 7; MORTGAGE, 24; PARTIES, 1, 4; REFORMING INSTRUMENTS, 2; VENDOR, 6.

Pledge.

1. The wife of a lunatic who had an ample estate, applied for an order requiring his guardian to redeem, for her benefit, certain separate property of hers (jewels &c.) pawned, with her consent, by her husband while sane, to pay his personal expenses, and the proceeds of the loan were so applied.—*Held*, that she was entitled to relief, and that her husband, under the circumstances, is bound, in equity, to redeem the property. *Harrall's Case*, 101

Powers.

1. Where legacies were, by one section of a will, charged on lands, and full power is thereby given to the executors to sell testator's lands in order to pay debts and legacies,—*Held*, that such power was not qualified by a power

Powers—Continued.

- given to the executors, in another section of the will, to sell after the death or marriage of testator's widow. *Brown v. Brown*, 422
2. Under a sale of lands to pay an assessment for improvements, a purchase thereof by the city is valid, although the power to make such purchase was not conferred until after such assessment had been laid. *Sutphin v. Trenton*, 468
3. Where two powers are conferred in the same sentence, and by the same words, and the subject or property on which they are to operate is described by the same words exactly, they must be held to embrace the same subject matter. *Anderson v. Anderson*, 560
4. Where a power is expressly given to executors over one portion of the estate, and is not expressly given over another portion, the omission manifests an intention that the power shall not be exercised on that portion of the estate over which it is not expressly given, although, in another portion of the will, general words are used broad enough to justify an implication that the whole estate should be subject to the power. *Id.*, 560
5. When the creator of a power prescribes the method of its execution, that method must be strictly pursued, so far, at least, as may be necessary to give effect to the creator's purpose. *Ferry v. Laible*, 566
6. A power to sell lands does not authorize the making of a mortgage. *Id.*, 566
7. Where a testator directs his executors to continue his business, and they incur debts in its prosecution, so much and no more of his assets as he has directed should be embarked in business, will stand charged in equity for the payment of the debts of the business. *Id.*, 566

See MUNICIPAL CORPORATIONS, 1.

Practice.

1. In his answer to a bill for an account, the defendant admitted the receipt of the money in respect to which the account was prayed, but alleged that he had, according to an agreement between him and the complainant, appropriated it to the payment of a debt due from her to him. The complainant set the cause down for hearing on bill and answer.—*Held*, that the appropriate decree was that the defendant account. *Bradshaw v. Clark*, 39

Practice—Continued.

2. Generally this court will not set aside a verdict on an issue at law, where the judge before whom such issue was tried certifies that he is satisfied with the verdict, and that it ought to be regarded as conclusive on the questions submitted to the jury. *Prudden v. Lindsley*, 436
 3. In a bill to quiet title, objections that the complainant has not alleged peaceable possession of the premises in dispute, and that no action to test the defendant's title thereto was pending, come too late at the hearing. *McClave v. Newark*, 472
 4. Under a special prayer, relief of the same general character but less extensive may be granted, or the prayer may be amended, if necessary. *Camden Horse R. R. Co. v. Citizens Coach Co.*, 525
- See ASSIGNMENT, 3; BILL OF PEACE; CONDITION; DIVORCE, 4; EVIDENCE, 4-6; INJUNCTION; PARTIES, 1.

Presumption.

See EVIDENCE, 9; MUNICIPAL CORPORATIONS, 2; PARENT AND CHILD, 3; TRUSTS, 7, 8.

Q.**Quia Timet.**

1. The act "to compel the determination of claims to real estate in certain cases, and to quiet the title to the same," does not warrant the filing of a bill to contest the legality of a municipal assessment, on the ground of its being an encumbrance on land. *Jersey City v. Lembeck*, 255
- See BILL OF PEACE; JURISDICTION, 5, 7.

R.**Railroads.**

1. A railroad company permitted its charter to be used for purposes of condemnation of lands for another company's road, and on the location of the latter, which paid and took title in its own name for the land, and built the road.—*Held*, that the road was the property of the latter company. If, in such case, any of the land condemned was paid for by the former company with its own funds, which have not been repaid to it, the latter company is bound to refund the amount. *Coe v. New Jersey Midland Railway Co.*, 105

Railroads—Continued.

2. A railroad company having located its road, permitted another company to locate its road on the same location and to build its road upon it.—*Held*, that the former thereby relinquished its right to the location. *Id.* 105
3. The case of *Randolph v. New Jersey West Line R. R.* 1 *Sec.* 49, distinguished. *Id.* 105
4. The fact that the property of an insolvent railroad company is under the charge of this court, does not in anywise secure to the company protection against lawful competition in its business, or secure for its property immunity against liability to lawful condemnation. *Central R. R. Co. v. Penn. R. R. Co.* 475
5. A general law authorizing any number of persons not less than seven to form a corporation to construct a railroad, does not exclude non-residents as corporators. *Id.* 475
6. That the places from and to which the road is to be constructed must be specified, is sufficiently complied with by designating one terminus as "at or near Bergen cut." *Id.* 475
7. The grant by the legislature of the power to exercise the right of eminent domain for the building of railroads for public use, to any persons who will undertake to construct them, leaving it to such persons to select the routes for themselves, is of itself a determination by the legislature that such roads are necessary or useful for the public. *Id.* 475
8. It is undoubtedly within the power of the court (and it is its duty), where an abuse of the general railroad law is attempted by the unlawful application of its provisions to a private use, to restrain the unauthorized proceedings. *Id.* 475
9. A corporation cannot, in its own name, subscribe for stock or be a corporator, under the general railroad law; nor can it do so, by a simulated compliance with the provisions of the law, through its agents as pretended corporators and subscribers of stock. *Id.* 475
10. An attempt by a corporation to avail itself unlawfully of the general railroad law to build a railroad, will, on complaint of the party injured, be enjoined as an abuse of the law. *Id.* 475
11. A horse-railroad company, chartered by the legislature, may, while legally operating its road, enjoin a rival coach company, organized under the general corporation act, and licensed by the city where the tracks are laid, from

Railroads—Continued.

regularly using its tracks with coaches adapted thereto, in competition with it in its business in transporting passengers and goods for hire, and from obstructing it in the use of such tracks by impeding the passage of its cars, by stopping thereon to take up and let down passengers. *Camden Horse R. R. Co. v. Citizens Coach Co.*, 525

See DEBTOR, 1; SPECIFIC PERFORMANCE, 3.

Receiver.

See DEVISE, 1; MORTGAGE, 31.

Reforming Instruments.

1. A railroad mortgage made to trustees without words of inheritance, but empowering the trustees, on default, to sell the mortgaged premises and to convey to the purchaser "all the estate, right, property and interest, and to the same extent as the railroad company had therein at the date of the mortgage, &c.," will be rectified so as to convey a fee. The court may direct the trustees to convey all their title to the purchaser at the foreclosure sale in aid of the execution. *Coe v. New Jersey Midland Railway Co.*, 105
2. Under a prayer for other or further relief in a bill for foreclosure, the mortgage may be reformed. *Id.*, 105
3. A court of equity never lends its aid, at the instance of the donee, to reform a voluntary deed. *Mulock v. Mulock*, 594
4. Equity will reform deeds for the correction of mistakes, but, to warrant the exercise of this power, the proof of mistake must be clear and satisfactory. *Hendrickson v. Wallace*, 604

See ACCIDENT, 1.

Rehearing.

1. It is discretionary in a court of equity, if the application for rehearing is promptly made, to open a final decree, where there is a meritorious defence, and the defendant (a married woman) has been deprived of such defence by the negligence of her solicitor in obtaining proofs and presenting them to the court. *Day v. Allaire*, 303
2. A defendant who intentionally withholds his defence, and assumes the hazard of escaping a decree on the weakness of the complainant's case, and fails, should be required to bear the consequences of his folly as the penalty of his laches and rashness. *Warner v. Warner*, 549

Rehearing—Continued.

3. In determining whether or not the proofs shall be opened in a case tried before the vice-chancellor, the same rules govern this court that govern the law courts in determining applications for new trials. *Id.*, 549
4. Error of judgment or mistake of law by counsel in conducting a cause, is no ground for a new trial. *Id.*, 549
5. A court of equity will not grant a rehearing because of an error of judgment or mistake of law by counsel as to the pertinency or force of certain evidence. *Id.*, 549
6. A litigant who has had a fair trial, with the aid of counsel of his own selection, and a full opportunity to prove his claim or defence, should, as a general rule, be required to accept the result as final, except he can show, in appellate proceedings, that on the case as made, injustice has been done or error committed. *Id.*, 549

Release.

See MORTGAGE, 2^o, 24, 26, 30.

Remainders.

1. Where remaindermen interested as such in personal property under a will of which the life tenant was executor, made no objection in his life-time to his inventory of the estate, but came into court after his death and four years after he filed the inventory, seeking to charge his estate with securities not in his inventory,—*Held*, that they were, under the circumstances, barred by their laches, *Hance v. Conover*, 505

See TENANT FOR LIFE.

Review.

1. This court cannot entertain a bill of review to revise a decree entered here upon remittitur from the court of errors and appeals, reversing the decree of this court. *Jewett v. Dringer*, 586
2. But this court may, upon a sufficient case being made under an original bill, give relief against the judgment of any judicial tribunal. *Id.*, 586

Rules of Chancery.

- Rule 11. *Union Bank v. Poulson*, 239
- Rule 38. *Ackerson v. Lodi Branch R. R.*, 42

S.

Set-Off.

1. Proceedings on a judgment at law will not be enjoined in equity, in order to give the defendant in such judgment an opportunity to set off or recoup a counter-claim, where such claim is unliquidated, and arose out of an entirely distinct transaction. *Jackson v. Bell*, 554

See INSURANCE.

Setting Aside Sales.

1. Where an administrator, party to a foreclosure suit for sale of the land of his intestate, after request by the creditors, refuses to apply to have the sale set aside, a creditor, on behalf of himself and other creditors, may obtain relief on petition. He may be permitted to intervene in the name of the administrator, on such terms, if any, as the court may see fit to impose for the indemnity of the latter, or, if occasion require, in his own name. *Van Dyke v. Van Dyke*, 176
2. Sale set aside on the ground of gross inadequacy of price, coupled with fraudulent conduct on the part of the purchaser in preventing competition. *Id.*, 176
3. Leave granted to the owner of the equity of redemption of mortgaged premises to redeem, where the sale of the premises under foreclosure proceedings took place contrary to the sheriff's assurance that it would be adjourned. *Nevius v. Egbert*, 460

Solicitor.

1. Parties who, with notice of the client's possession through his tenants, purchase premises from an attorney who cancelled a mortgage thereon left in his custody by his client and procured a conveyance of the premises to himself, are bound by the client's equities. *Purcell v. Enright*, 74

See AMENDMENTS; GUARDIAN; REHEARING, 1, 4-6; USURY, 1, 3; COSTS.

Specific Performance.

1. On a bill for specific performance of an agreement to convey, for a specified price, an interest in a land association, including the one-half of a certain lot,—*Held*, that the vendee could not be required to pay assessments previously made on such interest; but the cost of subse-

Specific Performance—Continued.

- quent improvements made on the lot, with the vendee's consent, were allowed. *Bell v. Bradner*, 47
2. A purchaser was to give a mortgage for part of the purchase-money. He offered to pay the whole in cash, if desired.—*Held*, that, under the circumstances, the fact of his insolvency would not avail as a defence against specific performance. *Hughes v. Young*, 60
3. By an agreement between two railroad companies, one, in consideration of a right to cross its road, gave the other a right to cross in future.—*Held*, that specific performance of the agreement would not be decreed where the crossing was to be at a place not contemplated by the parties, and where it would do very great damage to the former company—it would cross a drill and freight-yard. *Coe v. New Jersey Midland Railway Co.*, 105
4. Specific performance of a contract for the sale of lands against a defendant in possession of the premises since the time of making the contract, was ordered where the defendant set up outstanding claims of dower by the wives of two former owners, such claims having been extinguished in the one case by a conveyance of such right to the complainant, and in the other by a conveyance directly to the defendant, although one of the deeds was not obtained until after the bill had been filed. *Second Union Co-operative Soc. v. Hardy*, 442
5. Defendants in possession of the premises in their answer to a bill for specific performance of a contract to sell an undivided interest in lands, together with an assignment of complainant's interest in an ice crop on the premises, objected to carrying out their agreement (although their objections were not set out specifically) on the ground of defects in the title to the lands, and also because an assignment of the interest in the ice crop had not been tendered with the deed. At the hearing it appeared that the only defect in the title at the time of the tender was a lien for unpaid taxes for two years, which were subsequently paid; that no objection was then made because no assignment of the ice crop was tendered, and that the real ground of defendant's refusal to comply with the contract was an apprehension that they would not be able to carry on business on the premises amicably with one of their tenants in common.—*Held*, that the objections constituted no bar to specific performance. *Young v. Collier*, 444

Specific Performance—Continued.

6. Damages for loss of the use or custom of a mill previous to filing the bill, are recoverable at law, and cannot be allowed in a suit for the specific performance of the contract to supply water to such mill. *Iszard v. Mays Landing Co.*, 511

See ARBITRATION.

State.

See PARTIES, 8.

Staying Proceedings at Law.

1. The mere non-residence of a plaintiff in a judgment at law, and the consequent inability of the defendant therein to serve process on him in other proceedings at law, is, of itself, no ground for staying the enforcement of such judgment. *Jackson v. Bell*, 554

See REVIEW, 2; SET-OFF.

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Subrogation.*See* DEBTOR, 1.**Sureties.***See* ORPHANS COURT, 2.**T.****Taxes.***See* MUNICIPAL CORPORATIONS, 4, 5.**Telegraphs.***See* MUNICIPAL CORPORATIONS, 6–8.**Tenant for Life.**

1. Where the interest of a fund is directed to be paid to one person for life, and the principal fund to another on the death of the first, commissions for collecting and paying the interest must be paid out of the income, and are not chargeable against the principal. *Danly v. Cummins*, 208

Tenant for Life—Continued.

2. Where the income of all of a testator's property was given to his wife, for life, with a gift over of the property at her death,—*Held*,

(1) That the premium received by her on certain gold coin belonging to testator's estate, was part of the corpus, and not income to which she, as life tenant, was entitled.

(2) That the interest, receivable by her, must be computed from the date of testator's death. *Van Blarcom v. Dager*,

783

See LEGACY, 3.

Trusts.

1. A trustee is at liberty to apply to this court for his release from the trust, on the sole ground of unwillingness to act further therein. *Green v. Blackwell*, 37
2. The fact that he is one of two trustees, and that the deed of trust provides that, in case of the death of one, the survivor shall nominate, and, with the consent and approbation of the parties to the settlement or the survivors or survivor of them, appoint a new trustee in the place of the one who has died, will not induce the court to refuse the release. The court will supply the place of the trustee released. *Id.*, 37
3. That a very large and unexpected addition to the trust estate has been made, is, in itself, a good reason for releasing an unwilling trustee. *Id.*, 37
4. To establish a trust resulting from the payment of purchase-money, the proof must, where the trust and the grounds of it are denied, be clear, and the case made by the proof must be substantially the same as that made by the bill. *Parker v. Snyder*, 164
5. A testator, by a direction to continue his business, creates a trust estate which the court will keep separate and apply exclusively to the purposes of the trust. *Ferry v. Laible*, 566
6. In determining what part of his estate he intended so to embark, everything should be understood to have been included, which is reasonably and fairly necessary to the full accomplishment of the testator's scheme. *Id.*, 566
7. A trustee who, intentionally, without mistake or accident, destroys the written evidence of his trust, places himself in a position where the court is bound to make all reasonable presumptions against him. *Jones v. Knauss*, 609
8. All things may be presumed against a wrong-doer. *Id.*, 609

U.

Usury.

1. An attorney, with the consent and instructions of a mortgagor, deducted money from the amount of the mortgage, as compensation for examining the title, drawing the papers and obtaining the loan, no part thereof being received by the mortgagee.—*Held*, not to constitute usury. *White v. Dwyer*, 40
2. Money paid to a mortgagee's agent, in pursuance of an agreement between such agent and the mortgagor, as compensation for, and as consideration of, procuring the mortgagee's forbearance, no part thereof being received by the mortgagee, cannot be deducted on the foreclosure of the mortgage, as usury. *Forbes v. Baaden*, 381
3. Part of a commission charged for negotiating a loan was retained by the attorneys of the loaner for professional services connected therewith, and deducted from the amount loaned, no part being received by the mortgagee.—*Held*, that such mortgage was not usurious, although it was taken in the name of the attorneys as trustees for the loaner. *Coudert v. Flagg*, 394

V.

Variance.

1. A bill for an account and payment of the proceeds of five bonds and mortgages, alleged to have been assigned to the defendant through his importunity and fraud, for sale on commission, the proceeds of which the defendant, after sale, appropriated to his own use, dismissed on account of gross discrepancies between the allegations and proofs in this suit, and also in complainant's sworn answer in a suit in another state, touching the same matters; the assignments appearing on their face to have been made *bona fide*, and for value. *Gardner v. Raisbeck*, 23

See MORTGAGE, 10.

Vendor and Vendee.

1. A buyer did not disclose the fact that he was, in fact, purchasing for another person.—*Held*, that he was under no duty to disclose his principal. *Hughes v. Young*, 60
2. The recovery of a judgment against a railroad company for the value of land and damages taken by condemnation,

Vendor and Vendee—Continued.

- is no bar to the enforcement of a vendor's lien for the money. *Coe v. New Jersey Midland R. R. Co.*, 105
3. A person being the equitable owner and in the occupation of land, the record title being in a third party, must refrain from all acts calculated to produce a false impression as to the state of the title, in order to hold a person dealing with such ostensible owner, to the duty of inquiring with respect to the interest of such occupier. *Lathrop v. Groton Savings Bank*, 273
4. A contract for the sale of lands provided that of the purchase-money, \$100 should be paid in cash at the time when the agreement was made, and the remaining \$600 in monthly installments of \$10 each, no stipulation as to interest being inserted. The vendee entered and continued in possession at the time of filing his bill for specific performance.—*Held*, that he should pay interest on the installments as they came due. *Lang v. Moole*, 413
5. If a person purchases land of a vendee, with notice of the vendor's equitable lien for purchase-money, such purchaser will be charged with the same trust as the vendee. *Graves v. Coutant*, 763
6. The defence of a *bona fide* purchaser must be clearly and unequivocally set up in the answer, with the particulars of the purchase, and must be distinctly proved. *Id.*, 763
7. The claim of a vendor's lien for purchase-money, is one of peculiar equitable cognizance, and a vendor having no judgment or execution which binds the land, does not stand in the position of a creditor at large without remedy against the land in equity. *Id.*, 763
8. The recovery of a judgment at law for the unpaid purchase-money, will not merge or affect the vendor's lien. *Id.*, 763
9. The limitation of actions, if it be a defence against a vendor's lien, will not run while an action is pending in another state for the recovery of the debt, and the time of limitation must date from the judgment. *Id.*, 763
10. Where, by the law of a state, a vendor's lien for purchase-money is recognized, a discharge in bankruptcy of the vendee or his purchaser with notice, will not discharge the land. *Id.*, 763
- See* AGENT; COVENANT; EASEMENT, 1; TRUSTS, 4; WATER RIGHTS, 2, 3.

W.**Waste.**

See GUARDIAN; ORPHANS COURT, 2.

Water Rights.

1. The owner of land the surface water from which usually flows over his neighbor's lands, has no right to permit it, after being mixed with noxious matter on his land, to flow on the lands of his neighbor. *Gawtry v. Leland*, 385
2. Under a grant of the use of water for a certain purpose, with a prohibition against certain other uses specified, the grantee may use it for any purpose not prohibited. *Iszard v. Mays Landing Co.*, 511
3. Under the circumstances,—*Held*, the grantor in such a case had no right to entirely cut off the supply of water from the grantee on an alleged violation of his covenant regulating its use. *Id.*, 511

Way.

See EASEMENT, 1; EMINENT DOMAIN, 2; MORTGAGE, 2.

Wills.

1. The witnesses to a will signed in a room adjoining that in which the testator lay. Between the rooms there was a door partly open, but the testator could not see them sign.—*Held*, not to have been a compliance with the statute which requires that the witnesses sign in the presence of the testator. *Mandeville v. Parker*, 242
2. In order to avoid a will for uncertainty, it must be incapable of any clear meaning. *Stewart v. Stewart*, 398
3. Intermittent mental delusions resulting from and depending entirely on disease, and from which the testatrix was at other times free,—*Held*, not to have affected her testamentary capacity, it appearing that, when she executed her will, she knew what property she had, where and what it was, to whom she desired to give it, and why she selected her legatee and omitted others, and manifested no delusion. *Lee v. Scudder*, 633
4. Where one will is revoked by another, the revocation is testamentary, and the revocation of the latter will revives the former. *Randall v. Beatty*, 643
5. A testatrix executed several wills, all of which she destroyed, except one executed in 1870. By a will made in 1873, she expressly revoked all former wills, and delivered to a legatee therein a paper which she represented

Wills—Continued.

to be the will of 1870, with directions to destroy it, and that paper was destroyed. She afterwards cancelled the will of 1873. After her death, the will of 1870 was found, carefully preserved among her effects.—*Held*, that the cancellation of the will of 1873 revived that of 1870, and that the testatrix's imposition upon her legatee as to destroying the will of 1870 did not affect it, nor would evidence of her verbal declarations of revocation. *Id.*, 643

See DEVISE; LEGACY.

Witnesses.

See EVIDENCE, 4, 5.

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